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RECORD, CASE No. 14,726.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~817.~~ ~~535~~ 215

ANTHONY P. CARR, APPELLANT,

vs.

W. H. FIFE AND HARRIET A. FIFE, HIS WIFE, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

FILED JULY 7, 1891.

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1 In the District Court of the Second Judicial District of Washington Territory, Holding Terms at Tacoma, in and for Pierce County.

ANTHONY P. CARR, Plaintiff,
vs.
W. H. FIFE and HARRIET A. FIFE, His Wife; W. J. FIFE and Flora J. Fife, His Wife; Geo. W. Fife and Annie H. B. Fife, His Wife; M. J. Cogswell and Rebecca Cogswell, His Wife; Marion G. Denton, Harry J. Scheowin, J. M. Walden, F. T. Alds, Trustee; Andrew C. Smith and George O. Kelly, as Executors of the Last Will and Testament of Edward S. Smith, Deceased, Defendants.

Complaint.

To the Honorable Frank Allyn, judge of said court:

The plaintiff above named complains and alleges:

I.

That he enlisted as a volunteer in the Army of the United States on June 6th, 1861, and served as a soldier in the war of the rebellion for the period of three years. Re-enlisted and served one year and was honorably discharged from the service on the 31st day of October, 1864, and has ever since remained loyal to the Government.

II.

2 That on the 28th day of June, A. D. 1871, the plaintiff duly filed in the United States land office at Olympia, Washington Territory, his soldier's homestead declaratory statement and application, No. 1368, for the following-described tract of land, which said land was vacant public land of the United States situated in said Olympia land district and in said county of Pierce, to wit:

The west one-half of the northeast quarter (¼) and the northeast one-half (½) of the northwest quarter (¼) of section eight (8), in township twenty (20) north, of range three (3) east, of the Willamette meridian, containing one hundred and sixty (160) acres of land according to the United States survey, and then and there paid therefor to the receiver of said land office the fees in such case prescribed by law, to wit, the sum of twenty-two dollars ($22.00).

III.

That within six months thereafter the plaintiff entered upon said land and established his residence thereon and continued said residence for more than two years thereafter, during which said time he built a house and made other valuable improvements thereon, including a barn and outhouses and the clearing and cultivation of

a large area of said land; that all said work and improvements so done by plaintiff were reasonably worth the sum of one thousand dollars ($1,000.00).

3

IV.

The plaintiff at the expiration of said period of two years duly claimed at said land office the benefits of the provisions contained in section 1 of the act of Congress approved June 8, 1872, entitled "An act to amend an act relating to soldiers and soldiers' homesteads," and demanded that the time which he had so as aforesaid served in the army should be deducted from the time theretofore required in such case to perfect title as a homestead settler.

V.

That the register and receiver of said land office thereupon wrongfully and unlawfully rejected plaintiff's said claim to said benefits and wrongfully and unlawfully refused and failed to allow the said deduction of time and wrongfully and unlawfully refused to allow him to make his final proof for said land.

VI.

That on or about the sixth day of June, A. D. 1873, one Robert E. Sproule commenced at said land office a contest against plaintiff for said land, falsely alleging that plaintiff had abandoned the same; that thereafter and on the 17th day of July, A. D. 1873, the register and receiver of said land office took and received testimony in support of said allegation; that thereafter and on or about the — day of December, A. D. 1873, said register and receiver notified plaintiff in writing that in the matter of said contest said Sproule had

4 failed to prove an abandonment on the part of plaintiff; that plaintiff, relying on said notification, gave no farther attention to the matter of said contest and continued to reside upon and improve said land; that thereafter and during the summer season of the year 1873 and whilst plaintiff was still residing upon, cultivating, and improving said land he heard that said land had been patented to said Sproule; that plaintiff thereupon made inquiry at said land office as to the truth or falsity of said report heard by him and learned that the same was true; that, contrary to said notification, the records of said land office purported to show that said register and receiver had wrongfully and unlawfully and in disregard of all the facts in the premises and of plaintiff's said claim to the benefits of said provisions of said act of Congress and his said demand for deduction of time in his favor made a finding in favor of said Sproule and against this plaintiff in the matter of said contest.

That plaintiff, within the time allowed by law, offered to make final proof for said land; that said proof was unlawfully refused by said register and receiver.

VII.

That in January, A. D. 1874, plaintiff demanded said reduction of time in his favor and to make final proof for said land as aforesaid, but the register and receiver of said land office, through mistake of the law respecting the rights of plaintiff under said act of Congress, refused and rejected the same.

VIII.

That on or about the blank day of July, A. D. 1873, said register and receiver wrongfully and unlawfully received and accepted the pre-emption declaratory statement of said Sproule for said land.

IX.

That thereafter and on or about the — day of ——, A. D. 187–, said register and receiver wrongfully and unlawfully allowed said Sproule to make a pretended final proof therefor, and wrongfully and unlawfully received and accepted the same and recommended to their superior officers in the city of Washington, in disregard of plaintiff's rights under said act of Congress, that a patent for said land should be issued to said Robert E. Sproule.

X.

That thereafter and on the 13th day of December, A. D. 1875, a patent for said land was issued to said Robert E. Sproule, and said patent is recorded in the office of the auditor of said county of Pierce, at page 431 of volume 13 of deeds, records of said county.

6

XI.

That the issuance of said patent and the said recording thereof were in violation of the rights of plaintiff.

XII.

That said Sproule commenced said contest against plaintiff in pursuance of a fraudulent conspiracy between said Sproule and the defendants and their grantors to defeat the homestead claim of plaintiff and obtain said land for purposes of speculation.

XIII.

That said Sproule and said defendants and their grantors fraudulently procured the issuance of said patent to said Sproule without examination by the Land Department at Washington city into the justice or merits of said Sproule's claim thereto or into the rights of plaintiff in the premises.

XIV.

That at the time when said Sproule made his said declaratory statement for said land he was not a citizen of the United States nor

had he at any time theretofore declared his intention to become such.

XV.

That before said Sproule made his said declaratory statement he had taken up vacant public lands of the United States under the pre-emption and homestead laws.

That at the time when he made said declaratory statement
7 he had a subsisting and uncancelled homestead claim of record in said land office at Olympia.

XVI.

That from the time that plaintiff entered upon said land in the year 1871 he remained in possession thereof continuously until the year 1883, and has never at any time surrendered or delivered up said possession to said Sproule or any of said defendants or to any other person or persons.

XVII.

That the defendants claim to have some interest, claim, or title to said land; that whatever interest, claim, or title they claim or may have thereto is derived from and through the said fraudulent claim of said Sproule and through said alleged patent to him, and is in fraud of the rights of this plaintiff; that defendants claim to have acquired all the interest of said Sproule thereto.

XVIII.

That the defendants and each of them at the time when they acquired whatever interest, claim, or title they claim as aforesaid or may have and at all times had full notice and knowledge of the fraudulent actions by which the issuance of said patent to said Sproule was procured and effected and of the claim of plaintiff to the rightful ownership thereof.

8 Wherefore the plaintiff prays—

1. That the defendants may each of them be required to set forth the nature and extent of their respective claims.

2. That all claims of the defendants or either of them in and to said premises adverse to the claim of plaintiff may be determined by a decree of this court.

3. That by such decree it may be declared and adjudged that the defendants have no equitable right, title, claim, or interest in or to said land or any part thereof.

4. That said Robert E. Sproule acquired no right or interest in said land by reason of the issuance of said patent to him, and that said patent was unlawfully issued and is void for the purpose of conveying to said Sproule any right or interest in said land.

5. That the defendants be adjudged and decreed to hold said land in trust for the plaintiff.

6. That the plaintiff be adjudged and decreed to be the equitable owner of said land, and that the defendants be required to convey

the same to him by a good and sufficient deed by a day certain, and that in default thereof said land be conveyed to plaintiff by a commissioner of this court duly authorized thereunto.

7. That the defendants and each of them may by decree of this court be forever enjoined and restrained from asserting any
9 claim, right, title, interest, or equity whatsoever in or to said land or any part thereof adversely to the right of this plaintiff therein and thereto.

And for such other and further relief as to this court shall seem meet and agreeable to equity in the premises, and for costs of suit.

JOHN ARTHUR,
Attorney for Plaintiff.

TERRITORY OF WASHINGTON, }
County of Pierce. }

Anthony P. Carr, being first duly sworn, deposes and says:

I am the plaintiff in the above action named; I have heard read the foregoing complaint and know the contents thereof and believe the same to be true.

ANTHONY P. CARR.

Subscribed and sworn to before me this ninth day of April, 1887.

JOHN ARTHUR,
Notary Public.

(Endorsed:) A. P. Carr *vs.* W. H. Fife *et al.* Filed June 13th, 1887. A. Reeves Ayres, clerk, by L. O. Abbott, deputy clerk. John Arthur, att'y for pl'ff. Filed June 30th, 1890. A. Reeves Ayres, clerk.

10 ANTHONY P. CARR *vs.* W. H. FIFE *et als.* } No. 2015. Order.

Now, to wit, on the 11th day of July, 1887, being a regular day of June term of this court, comes the plaintiff, by John Arthur, of his counsel, and moves the court for leave to strike out of the title of said cause the name of George O. Kelly as administrator of the estate of Edward S. Smith, deceased, "as party defendant therein, and insert in lieu thereof the names of Andrew C. Smith and George O. Kelly as executors of the estate of Edward S. Smith, deceased," as parties defendant therein, and said defendants, by T. C. Sears, of their counsel, consents in open court to said motion, and, the court being fully advised in the premises, it is now ordered that said motion be, and is hereby, allowed and said leave granted.

FRANK ALLYN, *Judge.*

Entered in Journal VI, page 9.

(Endorsed:) Filed June 30th, 1890. A. Reeves Ayres, clerk.

11 In the District Court of the Second Judicial District of Washington Territory, Holding Terms at Tacoma, in and for Pierce County.

Answer.

ANTHONY P. CARR, Plaintiff,
vs.
W. H. FIFE and HARRIET A. FIFE, His Wife; W. J. FIFE and Flora J. Fife, His Wife; Geo. W. Fife and Annie H. B. Fife, His Wife; M. J. Cogswell and Rebecca Cogswell, His Wife; Marion G. Denton, Harry J. Schwinn, J. M. Walden, F. T. Olds, Trustee; Geo. O. Kelly and A. C. Smith, as Executors of the Last Will and Testament of Edward S. Smith, Deceased, Defendants.

Now come the defendants and, answering the complaint of the plaintiff in the above-entitled action, allege:

1st. That they have no knowledge or information sufficient to form a belief as to the 1st paragraph contained in said complaint.

2. They admit that at the time alleged in the II paragraph of said complaint the said plaintiff filed in the United States land office at Olympia, Washington Territory, his soldier's homestead declaration, statement, and application, as alleged, for the land described in said complaint. As to the other allegations contained in said paragraph they have no knowledge or information sufficient to form a belief.

12 3. They deny each and every allegation contained in the III paragraph of said complaint.

4. They have no knowledge or information sufficient to form a belief as to any of the allegations contained in the IV paragraph of said complaint.

5. They deny the allegations contained in the V paragraph of said complaint.

6. They admit that about the time alleged in the VI paragraph of said complaint one Robert E. Sproule commenced at the land office at Olympia, W. T., a contest against the said plaintiff for said land, and that thereafter and about the time mentioned in said paragraph the register and receiver of said land office took and received testimony in support of said allegation, and that the said register and receiver made a finding in favor of said Sproule and against said plaintiff herein in the matter of said contest; and they deny each and every allegation contained in said VI paragraph.

7. They have no knowledge or information sufficient to form a belief as to any of the allegations contained in the VII paragraph of said complaint.

8. They deny each and every allegation contained in the VIII paragraph of said complaint.

13 9. They deny each and every allegation contained in the IX paragraph of said complaint.

10. They admit the allegations contained in the X paragraph of said complaint.

11. They deny each and every allegation contained in the *II* paragraph of said complaint.

12. They deny each and every allegation contained in the XII paragraph of said complaint.

13. They deny each and every allegation contained in the XIII paragraph of said complaint.

14. They deny each and every allegation contained in the 14th parag——

15. They deny, upon information and belief, each and every allegation contained in the XV paragraph of said complaint.

16. They deny the and each of the allegations contained in the XVI paragraph of said complaint.

17. The defendants, excepting the defendants Denton and Olds, as trustee, admit that they claim to have some interest, claim of title in and to said described land, as alleged in the XVII paragraph of plaintiff's complaint herein, and deny each and every other allegation contained in said paragraph.

18. They deny each and every allegation contained in the XVIII paragraph of said complaint.

14 And the said defendants, excepting the defendant Marion G. Denton, further answering the complaint of the plaintiff herein, further alleges:

I.

That on or about the 13th day of December, 1875, the Government of the United States issued to Robert E. Sproule a patent for the lands described in the plaintiff's said complaint herein, and that since that time the said Sproule and his grantees, among whom are the defendants designated herein, have been in the quiet, peaceable, and undisturbed possession of said premises, and that the said defendants hold said premises under and by virtue of mesne conveyances from the said Robert E. Sproule.

II.

And in further answer to said complaint and as a defense to plaintiff's alleged cause of action the defendants further allege that neither the said plaintiff, his ancestor, predecessor, nor grantor were seized or possessed of the said premises described in said complaint within ten years before the commencement of this action.

Wherefore the defendants ask that they have judgment against the said plaintiff for their costs and disbursements herein, and that the said plaintiff be perpetually enjoined and restrained from asserting and claiming any interest in or to the land described in

15 said complaint, and that said complaint be dismissed, and for such other and further relief as to this court may seem equitable and just.

SEARS & ASHTON,
Attorneys for Defendants.

TERRITORY OF WASHINGTON, } ss:
County of Pierce, }

William H. Fife, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

W. H. FIFE.

Subscribed and sworn to before me this 11th day of August, 1887.

JAS. M. ASHTON,
Notary Public.

Endorsed: No. 2015. In the district court of the second judicial district of Washington Territory, holding terms at Tacoma for Pierce county. Anthony P. Carr *vs.* W. H. Fife *et al.* Answer. Filed August 13th, 1887. A. Reeves Ayres, clerk, by L. O. Abbott, deputy clerk. Filed June 30th, 1890. A. Reeves Ayres, clerk.

Attached to said answer is the following, to wit:

16 In the District Court of the 2nd Judicial District of Washington Territory, Holding Terms at Tacoma, in and for Pierce County.

ANTHONY P. CARR
vs.
W. H. FIFE and HARRIET A. FIFE, His Wife; W. J. FIFE and Flora J. Fife, His Wife; Geo. W. Fife and Annie H. B. Fife, His Wife; M. J. Cogswell and Rebecca Cogswell, His Wife; Marion G. Denton, Harry J. Schwinn, J. M. Walden, F. T. Olds, Trustee, and Geo. O. Kelly and A. C. Smith, as Executors of the Last Will and Testament of Edward S. Smith, Deceased.

Amended Answer and Cross-Bill.

Now come the defendants in the above-entitled action and, by leave of the court and agreement of counsel first had and obtained, file their amended answer to the complaint of the plaintiff herein as follows:

I.

They say that they have no knowledge or information as to the truth of the allegations contained in paragraph I of said complaint, and therefore they deny the same.

17 II.

They admit the allegations contained in paragraph II of said complaint.

III.

They admit that plaintiff, within six months after the 28th day of June, 1871, entered upon said lands, to wit, the lands mentioned

and described in paragraph III of said complaint, but they deny each and all of the other allegations contained in said paragraph III of said complaint.

IV.

Upon information and belief they deny that plaintiff did and performed the acts or any of them alleged in paragraph IV of said complaint at the expiration of two years from June 28th, 1871, or at any other time or at all.

V.

Upon information and belief they deny the allegations contained in paragraph V of said complaint.

VI.

They admit that at about the time alleged in paragraph VI of said complaint one Robert E. Sproule commenced in the United States land office at Olympia, Washington Territory, a contest against the said plaintiff, as hereinafter more specifically set
18 forth and alleged, and that thereafter and on or about July 17th, 1873, the register and receiver of said land office took and received testimony in the matter of said contest; but upon information and belief they deny each and every other allegation contained in paragraph VI of said complaint, excepting that they admit that the records of said land office showed in the summer season of 1878, and they allege that they showed the same at all times subsequent to August 10th, 1873, that the said register and receiver had made a finding upon said contest in favor of said Sproule and against the plaintiff herein.

VII.

They upon information and belief deny the allegations contained in paragraph VII of said complaint, whether as containing facts occurring in January, 1874, or at any other time or at all.

VIII.

They admit that on or about the — day of —— the said register and receiver received and accepted the pre-emption declaratory statement of said Sproule for said land, but they deny that the same was done wrongfully or unlawfully.

IX.

They admit that on or about the — day of —— said register and receiver allowed said Sproule to make final proof for said
19 land and accepted the same and recommended to their superior officers in the city of Washington that a patent for said land should be issued to said Sproule, but they deny that any of the said acts of the said register and receiver were either wrongful or unlawful or in disregard of any rights of the plaintiff, or that said

Sproule's proof was pretended, as alleged in paragraph IX of said complaint.

X.

They admit the allegations contained in paragraph X of said complaint.

XI.

Upon information and belief they deny each and every of the allegations in paragraphs XI, XII and XII-, XIV, and XV of said complaint.

XII.

They deny upon information and belief that plaintiff was in the possession of said lands or of any part thereof from the time of his entry thereon, in 1871, continuously or otherwise, or at or during any other time except in the manner and at the times hereinafter specifically set forth and admitted.

XIII.

They, except the defendants Marion Denton and F. T. Olds, trustee, admit that they claim to have some interest, claim, and title to said lands, and that their said interest, claim, and title is derived from the said Sproule under the said patent of the United States to him, and embraces all the interest of said Sproule therein, but they deny each and every other allegation contained in paragraph XVII of said complaint.

And the said Marion Denton and F. T. Olds, trustee, disclaim any interest, claim, title, or estate in said lands or any part thereof.

XIV.

They deny each and every allegation contained in paragraph XVIII of said complaint, and they further deny that they or any of them ever had or now have any notice or knowledge whatever of any fraudulent acts on the part of said Sproule in connection with the issuance of said patent to him or that they had notice of any claim of the plaintiff to the ownership of said patent or of said land before the commencement of this action.

XV.

And, further answering the complaint of the plaintiff herein, the defendants allege that neither the plaintiff nor his ancestor, predecessor, or grantor was seized or possessed of the said land or any part thereof within ten years before the commencement of this action.

XVI.

And the defendants, further answering the complaint of the plaintiff herein, allege upon information and belief—

21 1. That the plaintiff herein, on or about the 28th day of June, 1871, desiring and intending to procure the conveyance to himself by the United States of the land and premises mentioned and described in the plaintiff's complaint without compensation or consideration and without any substantial compliance on his own part with any of the laws of the United States governing the disposal of the public domain, and fraudulently intending and contriving to cheat and defraud the said United States out of said lands by subsequent intended false allegations to the effect that he had complied with the homestead laws of the said United States to be made to the register and receiver of the United States (see copy) land office at Olympia with reference to said land, to the end that he might obtain a patent from the United States therefor, filed in the said land office on the 28th day of June, 1871, his said homestead declaration and affidavit, and was by the said register and receiver permitted to make original entry of said land as and for his homestead, and he hereby procured the said lands, which were surveyed public lands of the United States, to be entered and noted upon the records and plats of said land office and in the office of the Commissioner of the General Land Office of the United States as the homestead claim of him, the said plaintiff, and thereby caused the said
22 lands to be withdrawn from sale to or entry by any other qualified person during the ensuing term of seven years.

2. That thereafter and until the 6th day of June, 1873, the plaintiff, in pursuance of his said fraudulent purpose to acquire said lands from the United States in the manner aforesaid, claimed said lands as his homestead, but said plaintiff never at any time made any settlement upon said lands or had a residence thereon or, though he was the head of a family, removed his family thereto or cultivated any portion thereof or made any substantial improvements thereon, but continued to maintain his residence, as theretofore, at another place, and only made such pretended and sham improvements upon said land as he believed and expected would enable him to deceive the officers of the Land Department of the United States into causing a patent for said lands to be executed and delivered to him, and the plaintiff at some time between June 28th, 1871, and June 6th, 1873, procured large quantities of the valuable timber growing upon said lands to be cut and removed therefrom for the purpose of gain for himself and not for the purpose of cultivating said lands or any part thereof or for any domestic use upon said land, and that the said plaintiff by his said acts, which were fraudulent and in violation of the laws of the United States, had, on said 6th day of June, 1873, failed to comply with the
23 homestead laws of the United States as to settlement, improvement, and cultivation of said land and had justly forfeited the same to the United States.

3. That on the 6th day of June, 1873, one Robert E. Sproule made proper complaint to the register and receiver of the said land office at Olympia that the said plaintiff had abandoned said land and changed his residence therefrom for more than six months since making his entry and next prior to said June 6th, 1873, and that

said lands were not settled upon or cultivated by plaintiff as required by law, and offered to prove the same, and prayed a hearing of his said complaint and that the said homestead entry of the plaintiff be cancelled and forfeited to the United States.

4. That thereupon and on said 6th day of June, 1873, the said register and receiver took cognizance of the complaint of said Sproule and ordered a hearing thereon at the said land office on the 17th day of July, 1873, of which order and of the complaint of said Sproule the plaintiff herein had due notice.

5. That on said 17th day of July, 1873, and on subsequent days, the matters alleged in the complaint of said Sproule were heard at said land office before the said register and receiver and the plaintiff and said Sproule appeared at said hearing in person and by
24 counsel and witnesses were examined on behalf of said Sproule, as contestant, and of the plaintiff herein, as contestee, and the cause was submitted to said register and receiver for their decision upon the testimony produced as aforesaid.

6. That thereafter and on the 10th day of August, 1873, said register and receiver filed their decision of said cause in writing and decided said cause and recommended to the Commissioner of the General Land Office that the said homestead entry of plaintiff be cancelled for his failure to cultivate, improve, and reside upon said land as required by law, of which decision the plaintiff herein had notice.

7. That thereafter and on the 5th day of September, 1873, the plaintiff, by his counsel, filed with the said register and receiver his notice of an appeal, and he appealed from the said decision of the register and receiver to the Commissioner of the General Land Office upon grounds by him stated in his said notice of appeal.

8. That thereupon the papers containing the proceedings in said land office in said cause, including the testimony of the witnesses taken upon said hearing in writing, the arguments of counsel, the decision of the register and receiver, and the notice of appeal of the plaintiff herein, were duly transmitted to the Commis-
25 sioner of the *of the* General Land Office, and counsel for the plaintiff herein argued said appeal to said Commissioner.

9. That thereafter and on the 16th day of October, 1873, the Commissioner of the General Land Office considered said appeal and rendered his decision thereon and affirmed the said decision of the register and receiver and transmitted the same to said register and receiver, of all of which the plaintiff herein had notice.

10. That thereafter and on the 5th day of January, 1874, the plaintiff herein, by his counsel, filed with the said register and receiver his notice of appeal, and he appealed from the said decision of the Commissioner of the General Land Office to the Secretary of the Interior upon grounds stated in his said notice of appeal; and thereupon the said notice of appeal to the Secretary of the Interior and the papers containing the proceedings in said land office mentioned in the foregoing paragraph, 8, and the said decision of the Commissioner of the General Land Office were duly transmitted to

the Secretary of the Interior, and counsel for the plaintiff herein argued said appeal to the Secretary of the Interior.

26 11. That thereafter and on the 5th day of May, 1874, the Secretary of the Interior considered said appeal and rendered his decision thereon and affirmed the said decision of the Commissioner of the General Land Office, which decision of the Secretary of the Interior was never reversed or modified.

12. That thereafter and on the 9th day of May, 1874, the Commissioner of the General Land Office canceled said entry of the plaintiff herein upon said land upon the records of his office and directed the same to be canceled upon the records of the said land office at Olympia by the said register and receiver, and it was so canceled; and thereupon said lands became and were forfeited to the United States, and the plaintiff herein ceased to have and never since has had any right, title, or interest in or claim to said lands or any part thereof.

XVII.

And the defendants further allege that upon the cancellation of the plaintiff's entry of said land as aforesaid the said register and receiver, as by law required, notified said Sproule of the said cancellation and of his right to enter said lands, and that thereafter such proceedings were taken and had by said Sproule in the

27 land offices of the United States that on or about December 13th, 1875, the United States executed and delivered to said Sproule a patent for said lands, and said Sproule was them and ever since has been and now is by himself and his grantees, the defendants, by sundry mesne conveyances from him and his grantees, in the exclusive, quiet, peaceable, and undisturbed possession of said lands and of the whole thereof.

Wherefore the defendants herein pray that the plaintiff take nothing by his action, and that the defendants have judgment against the plaintiff for their costs in this action.

And the above-named defendants, W. H. Fife and Harriet A. Fife, his wife; W. J. Fife and Flora J. Fife, his wife; Geo. W. Fife and Annie H. B. Fife, his wife; M. J. Cogswell and Rebecca Cogswell, his wife; Harry J. Schwinn, J. M. Walden, and Geo. O. Kelly and A. C. Smith, as executors of the last will and testament of Edward S. Smith, deceased, file this their cross-bill and counter-claim against the said plaintiff, Anthony P. Carr, and represent to the Hon. Frank Allyn, judge of said court, and allege:

1. That the said Edward S. Smith died at San Francisco, in the county of San Francisco, in the State of California, on the 31st day of December, 1885, seized and possessed of an estate in the

28 said county of Pierce and leaving a last will and testament; that thereafter such proceedings were taken and had in the matter of the estate of said Edward S. Smith, deceased, in the probate court of said county of Pierce, that the said last will and testament of said Smith, deceased, was duly admitted and probated, and that the said George O. Kelly and A. C. Smith were by said probate court duly appointed executors of the estate of said Smith

under said will and testament, and letters testamentary were duly issued to said Kelly and A. C. Smith, which are now still unrevoked, and that said Kelly and A. C. Smith duly qualified as such executors on the — day of ——, 1886, and ever since have been and now are the qualified and acting executors of the will and estate of said Smith, deceased, and ever since said date have been and now are in possession of his estate in said county of Pierce.

II.

That ever since the 13th day of December, 1875, the said Edward S. Smith, by himself and his said executors, and the other cross-complainants herein, by themselves and their grantors, by sundry mesne conveyances from Robert E. Sproule, a patentee from the United States, have been and they now are the owners and in the possession of and entitled to the possession of the following-described lands in the said county of Pierce, to wit: The west half of
29 the northeast quarter and the east half of the northwest quarter of section 8 (eight), township twenty north, range three east, of the Willamette meridian, containing one hundred and sixty acres.

III.

That the said Anthony P. Carr, without any right whatever in him, gives out and maintains to the public that he is the owner of said lands and is entitled to the possession of the same, and claims that the cross-complainants herein are not the owners and are not entitled to the possession thereof.

IV.

That the said claim of the said Carr is not based upon any right or claim in him whatever, and is a cloud upon the title of the cross-complainants herein to the said lands, and prevents their full enjoyment of the same and interferes with their disposal of the same by sale to other parties.

Wherefore these cross-complainants pray that they may have the judgment of this honorable court—

1. That they are the owners and entitled to the possession of said lands and of the whole thereof.

2. That the said Anthony P. Carr is not the owner or entitled to the possession of said lands or of any part thereof.

30 3. That the said Carr may be forever enjoined and restrained from setting up or claiming that he is the owner or is entitled to the possession of said lands or any part thereof.

4. That they may have such other and further relief in the premises as shall be equitable and just.

5. That they may have judgment against the said plaintiff for the costs and disbursements paid and incurred in this action.

EVANS, SEARS AND HUSTON AND
THEODORE L. STILES,
Attorneys for Defendants.

31 TERRITORY OF WASHINGTON, } ss:
County of Pierce, }

William H. Fife, having been first duly sworn, on oath says that he is one of the defendants and cross-complainants in the above-entitled action; that he has read the foregoing answer and cross-complaint and knows the contents thereof, and that the facts therein stated are true of his own knowledge except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

W. H. FIFE.

Subscribed and sworn to before me this 21st day of February, A. D. 1888.

ELLWOOD EVANS,
[SEAL.] *Notary Public in and for Washington Territory.*

(Endorsed:) We consent to filing the within amended answer and admit due service of a copy thereof. Carroll & Coiner & John Arthur, att'ys for plaintiff. No. 2015. In the district court in and for the 2nd judicial district of Washington Territory, holding terms at Tacoma. Anthony P. Carr *vs.* Wm. H. Fife *et al.* Amended answer. Filed Feb. 23rd, 1888. A. Reeves Ayres, clerk, by L. O. Abbott, deputy clerk. Evans, Sears & Huston, att'ys for def't-. Filed June 30th, 1890. A. Reeves Ayres, clerk.

32 TERRITORY OF WASHINGTON, } ss:
Second Judicial District, County of Pierce, }

In the District Court, Holding Terms at Tacoma.

ANTHONY P. CARR, Plaintiff,
vs.
W. H. FIFE and HARRIET A. FIFE, His Wife; W. J. Fife and Flora J. Fife, His Wife; Geo. W. Fife and Annie H. B. Fife, His Wife; M. J. Cogswell and Rebecca Cogswell, His Wife; Marion G. Denton, Harry J. Schwinn, J. M. Walden, P. T. Olds, Trustee, and George O. Kelly and A. C. Smith, as Executors of the Last Will and Testament of Edward S. Smith, Deceased, Defendants.

Demurrer to Amended Answer and Cross-bill.

Comes now said plaintiff and demurs to the amended answer and cross-bill and counter-claim of said defendants filed herein for the reason that the same does not state facts sufficient to constitute a defense or a cause of action or a ground of relief.

JOHN ARTHUR AND
CARROLL AND COINER,
Attorneys for Plaintiff.

(Endorsed:) Received a copy of the within demurr- this 6th day of August, 1888. Sears, Evans & Stiles, att'ys for def'ts. Filed June 30th, 1890. A. Reeves Ayres, clerk. Filed Aug. 6, 1888. A. Reeves Ayres, clerk, by L. O. Abbott, deputy clerk.

33 TERRITORY OF WASHINGTON, *Second Judicial District, County of Pierce,* } ss:

In the District Court, Holding Terms at Tacoma.

ANTHONY P. CARR, Pl'ff, *vs.* W. H. FIFE *et al.*, Def'ts. } No. 2015. Order.

On this 7th day of August, 1888, at chambers, the demurrers of the plaintiff to the amended answer and to the cross-complaint, respectively, of the defendants came duly on for hearing, and after argument by John Arthur and Thomas Carroll, in support thereof, and by T. S. Stiles and T. C. Sears, in opposition thereto, and the court being fully advised in the premises, it is—

Ordered that said demurrer to the amended answer be, and is, overruled, and that said demurrer to said cross-complaint be, and is, sustained.

And thereupon the defendants, by their counsel, confess said demurrer to said cross-complaint and withdraw said cross-complaint.

Plaintiff, by his counsel, duly excepts to so much of said order as overrules the demurrer to said amended answer, and his exception is allowed.

FRANK ALLYN, *Judge.*

34 ANTHONY P. CARR, Pl'ff, *vs.* W. H. FIFE *et als.*, Def'ts. } No. 2015. Order.

On this 7th August, 1888, at chambers, the demurrer of the plaintiff to the amended answer and to the cross-complaint respectively of the defendants came duly on for hearing, and after argument by John Arthur and Thomas Carroll, in support thereof, and by T. S. Stiles and T. C. Sears, in opposition thereto, and the court being fully advised in the premises, it is—

Ordered that said demurrer to the amended answer be and is overruled, and that said demurrer to said cross-complaint be and is sustained; and thereupon the defendants, by their counsel, confess said demurrer to said cross-complaint and withdraw said cross-complaint.

Plaintiff, by his counsel, duly excepts to so much of said order as overrules the demurrer to said amended answer, and his exception is allowed.

FRANK ALLYN, *Judge.*

Entered in Journal VI, page 645.

(Endorsed:) Filed June 30th, 1890. A. Reeves Ayres, clerk.

35 *Registry Receipt, Tacoma, Washington.*

Post office at ——.

Registered letter parcel No. 278 rec'd Aug. 12, 1887, of Sears and Ashton, addressed to John Arthur, Seattle, W. T.

L. E. SAMPSON, *P. M.*

In the District Court of the Second Judicial District of Washington Territory, Holding Terms at Tacoma, in and for Pierce County.

ANTHONY P. CARR, Plaintiff,
vs.
WILLIAM H. FIFE and HARRIET A. FIFE, His Wife, and Others, Defendants.
} No. 2015. Stipulation.

It is hereby stipulated and agreed by and between the parties to the above-entitled action that this cause be referred to C. B. Eaton, an attorney of this court, to take the testimony herein and report the same to this court.

And it is hereby further stipulated and agreed that the order so referring the cause may be made by the judge of the above court wheresoever he may be in term time or vacation.

Dated Tacoma, W. T., September 1, 1887.

JOHN ARTHUR,
Attorney for Plaintiff.
SEARS & ASHTON,
Att'ys for Defendants.

36 (Endorsed:) No. 2015. Anthony P. Carr, pl'ff, *vs.* William H. Fife —, def'ts. Stipulation. Filed Sep. 7th, 1887. A. Reeves Ayres, clerk, by L. O. Abbott, deputy clerk. Filed June 30th, 1890. A. Reeves Ayres, clerk.

In the District Court of the 2nd Judicial District of Washington Territory, Holding Terms at Tacoma, in and for Pierce County.

ANTHONY P. CARR, Plaintiff,
vs.
WILLIAM H. FIFE *et al.*, Defendants.
} Order of Reference.

On reading and filing the stipulation of the parties to the above-entitled action, dated September 1st, 1887, it is ordered by the court that this cause be, and the same is hereby, referred to C. B. Eaton, an attorney of this court, to report the testimony to this court.

Dated Sept. 5, 1887.

FRANK ALLYN.
Judge of said Court.

(Endorsed:) No. 2015. Anthony P. Carr, pl'ff, *vs.* William H. Fife *et al.*, def'ts. Filed Sept. 7, 1887. A. Reeves Ayres, clerk, by L. O. Abbott, deputy clerk. Filed June 30, 1890. A. Reeves Ayres, clerk.

37 (Endorsed:) No. 2015. Anthony P. Carr *vs.* W. H. Fife *et al.* Order. Filed 11th day of August, 1888. Entered on page 645 of P. Journal 6. A. Reeves Ayres, clerk, by L. O. Abbott, deputy clerk. Filed June 30th, 1890. A. Reeves Ayres, clerk.

TERRITORY OF WASHINGTON, } *ss:*
Second Judicial District, County of Pierce, }

In the District Court, Holding Terms at Tacoma.

ANTHONY P. CARR, Plaintiff,
vs.
W. H. FIFE and HARRIET A. FIFE, His Wife; W. J. Fife and Flora J. Fife, His Wife; George W. Fife and Annie H. B. Fife, His Wife; M. J. Cogswell and Rebecca Cogswell, His Wife; Marion G. Denton, Harry J. Schwinn, J. M. Walden, F. T. Olds, Trustee, and Geo. O. Kelly and A. C. Smith, as Executors of the Last Will and Testament of Edward S. Smith, Deceased, Defendants. } No. 2015.

38 Comes now the plaintiff and, by leave of court and consent of parties first had and obtained, files herein his reply to the amended answer and cross-bill and counter-claim of the defendants herein, and, replying thereto, says:

1. Replying to paragraph numbered VI of said amended answer, he denies that said register and receiver at any time made a finding upon said contest in favor of said Sproule and against the plaintiff herein, but admits that they illegally and unwarrantably suggested a cancellation of plaintiff's homestead entry.

2. Replying to paragraph numbered XV of said amended answer and demurring thereto for insufficiency as a defense or answer and saving the right to file a separate demurrer thereto for such insufficiency, he says that during the whole of the years 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, and 1884 and theretofore and thereafterwards the defendants' grantor, Robert E. Sproule, to whom a patent of the United States for the premises in controversy had been unlawfully issued and in whom by reason of said patent the apparent legal title to said premises was vested during said named years, was out of said Territory of Washington and resided out of said Territory and had departed therefrom and never returned thereto.

39 3. Replying further to said paragraph XV and demurring as aforesaid and saving the aforesaid right to file a separate demurrer thereto, he says that the above-mentioned Edward S. Smith, from and since the commencement of his alleged claim and interest in said premises under said Sproule, was out of said Territory for six months and upwards in the year 1885 and died out of said Territory on the 31st day of December, A. D. 1885, and that said George O. Kelly did not qualify as executor as aforesaid until the 21st day of April, A. D. 1886, and that said A. C. Smith did not qualify as executor as aforesaid until the 3rd day of May, A. D. 1886.

4. Replying to paragraph numbered XVI of said amended an-

swer and to each and every subdivision or subparagraph thereof, he denies each and every allegation of new matter therein contained.

5. Replying to paragraph numbered XVII of said amended answer, he denies that said Sproule and said defendants have been or that any or either of them has been since the 13th day of December, 1875, or at any time were in the exclusive, quiet, peaceable, and undisturbed possession of said lands or at all in the possession thereof, and alleges that, on the contrary, this plaintiff was, on said 13th day of December, 1875, and has ever since continued to be in possession of said premises and of the whole thereof.

40 6. Plaintiff denies each and every allegation of new matter in said amended answer contained which is not hereinabove specifically denied.

7. Replying to said cross-bill and counter-claim, plaintiff denies the allegations contained in paragraph numbered 1 thereof respecting the dates of the death of said Edward S. Smith and of the qualifications of said George O. Kelly and A. C. Smith, as executors as aforesaid, and alleges that the true dates of said events are as stated in paragraph III of this reply.

8. Plaintiff denies each and every allegation contained in paragraph numbered II of said cross-bill and counter-claim.

9. He denies that his claims, as stated in paragraph numbered III of said cross-bill and counter-claim, are without right in him, and alleges that on the contrary his said claims are just, equitable, and lawful.

10. He denies the allegation contained in paragraph numbered IV of said cross-bill and counter-claim that his said claim is not based upon any lawful right or claim in him, and alleges as he has alleged in the last paragraph hereinabove, and he further denies that said cross-complainants and counter-claimants or any of them have any just or lawful title in or to said lands or any

41 part thereof, and denies their claim to enjoy or dispose by sale of said lands or any part thereof.

11. Plaintiff denies each and every allegation of new matter contained in said cross-bill and counter-claim which is not hereinabove specifically denied.

Wherefore plaintiff prays for judgment as he before has prayed.

JOHN ARTHUR AND
CARROLL & COINER,
Attorneys for Plaintiff.

TERRITORY OF WASHINGTON, } ss:
County of Pierce, }

I, Anthony P. Carr, being first duly sworn, depose and say I am the plaintiff named in the above action. I have heard read the foregoing reply and know the contents thereof, and believe the same to be true.

ANTHONY P. CARR.

Subscribed and sworn to before me this 6th day of August, 1888.

JOHN ARTHUR,
Notary Public.

(Endorsed:) Received copy of the within reply this 6th day of August, 1888. Sears, Evans & Stiles, att'ys for def'ts. 2015. Filed June 30th, 1890. A. Reeves Ayres, clerk. Filed Aug. 6th, 1888. A. Reeves Ayres, clerk, by L. O. Abbott, deputy clerk.

42 ANTHONY P. CARR *vs.* W. H. FIFE *et al.* } 2015.

Come now the parties hereto and give notice of an agreement that judgment may be had herein whenever the evidence shall be wholly taken and issues completed, even though there be no term of court at said time; whereupon it is so ordered and this cause is hereby continued for the time.

(Endorsed:) Carr *vs.* Fife. Filed June 30th. A. Reeves Ayres, clerk. Filed 27 day of February, 1888, and entered on page 282 of Journal 6. A. Reeves Ayres, clerk, by L. O. Abbott, deputy clerk.

43 ANTHONY P. CARR *vs.* W. H. FIFE *et als.* } Order of Reference.

On reading and filing the stipulation of the parties to the above-entitled action, dated September 1st, 1887, it is ordered by the court that this cause be, and the same is hereby, referred to C. B. Eaton, an attorney of this court, to report the testimony to this court.

Filed Sept. 7th, 1887.

FRANK ALLYN, *Judge.*

Entered in Journal VI, page 63.

(Endorsed:) Filed June 30th, 1890. A. Reeves Ayres, clerk.

44 In the Second Judicial District Court in and for Pierce County, Washington Territory.

ANTHONY P. CARR *vs.* WILLIAM H. FIFE and Others. } No. 2015.

It is hereby stipulated that the above-entitled cause may be set for trial before Hon. Frank Allyn, judge of said court, sitting at chambers, on Monday, the 26th day of November, 1888, at 10 o'clock a. m., and that the cause shall be then or on the first day thereafter upon which said judge shall be present proceeded with until concluded.

Dated Tacoma, W. T., Nov. 10th, 1888.

JOHN ARTHUR AND
CARROLL & COINER,
Att'ys for Plaintiff.
EVANS, SEARS AND HUSTON AND
F. L. STILES,
Attorneys for Defendants.

(Endorsed:) Upon the annexed stipulation ordered that the said cause be set down for trial on Monday, November 25th, 1888, and be proceeded with as stipulated. Dated Nov. 10th, 1888. Frank Allyn, judge.

(Endorsed:) No. 2015. Second jud. dist. of W. Ter., Pierce Co. Anthony P. Carr *vs.* William H. Fife and others.

45 Superior Court, Pierce County, Washington.

ANTHONY P. CARR
vs.
W. H. FIFE and Others.

It is hereby stipulated between the above-named plaintiff and the above-named defendants that the above-entitled cause, which was heretofore heard and submitted for decision in the second judicial district court of the Territory of Washington in and for Pierce county on the 17th day of December, 1888, be now resubmitted for decision to the said superior court upon the pleadings, testimony, and briefs of counsel on file.

Dated Dec. 11, 1889.

CARROLL AND COINER AND
JOHN ARTHUR,
Attorneys for Plaintiff.
SEARS, EVANS AND STILES,
Att'ys for Defendants.

(Endorsed:) 2015. A. P. Carr *vs.* W. H. Fife *et al.* Stipulation. Filed June 30th, 1890. A. Reeves Ayres, clerk. Filed Jan. 11th, 1890. W. H. Fletcher, clerk.

46 (Endorsement continued:) Stipulation to set cause for trial and order setting same. Filed Nov. 10, 1888. A. Reeves Ayres, clerk, by L. O. Abbott, deputy clerk. Filed June 30th, 1890. A. Reeves Ayres, clerk.

47 In the Superior Court of Pierce County, State of Washington.

ANTHONY P. CARR, Plaintiff,
vs.
W. H. FIFE and HARRIET A. FIFE, His Wife; W. J. FIFE and Flora J. Fife, His Wife; M. J. Cogswell and Rebecca Cogswell, His Wife; Marion G. Denton, Harry J. Schwinn, J. M. Walden, F. T. Olds, Trustee, and Geo. O. Kelly and A. C. Smith, as Executors of the Last Will and Testament of Edward S. Smith, Deceased, Defendants. } No. 2015.

To William H. Fletcher, clerk of the above court.

SIR: You will please transfer the above cause and all the files, proceedings, and records therein to the circuit court of the United States for the district of Washington.

Dated April 23rd, 1890.

PARSONS & CADWELL,
Attorneys for Defendants.

48 (Endorsed:) In the superior court, Pierce Co., Washington. Anthony P. Carr, plaintiff, *vs.* W. H. Fife *et al.*, defendants. Transfer C. C. U. S. Parsons & Caldwell, attorneys for defendants. Filed April 23rd, 1890. W. H. Fletcher, clerk. Filed June 30th, 1890. A. Reeves Ayres, clerk.

49 In the Superior Court of Pierce County, State of Washington.

ANTHONY P. CARR, Plaintiff,
vs.
W. H. FIFE and HARRIET A. FIFE, His Wife; W. J. FIFE and Flora J. Fife, His Wife; M. J. Cogswell and Rebecca Cogswell, His Wife; Marion G. Denton, Harry J. Schwinn, J. M. Walden, F. T. Olds, Trustee, and Geo. O. Kelly and A. C. Smith, as Executors of the Last Will and Testament of Edward S. Smith, Deceased, Defendants.

The above-named defendants having filed a written request with the clerk of this court that this cause be transferred to the circuit court of the United States for the State of Washington, as provided by section 23 of the act of Congress approved February 22, 1889, commonly called the "enabling act"—

It is ordered that the clerk of this court forthwith file all
50 the original pleadings, evidence, and documents on file herein and a certified copy of all the record entries in this cause in the office of the clerk of the said circuit court of the United States.

Dated May 26th, 1890.

FRANK ALLYN, *Judge.*

(Endorsed:) No. 2015. In the superior court, Pierce Co., Wash. Anthony P. Carr, plaintiff, *vs.* W. H. Fife *et al.*, defendants. Order to transfer. Filed May 27th, 1890. W. H. Fletcher, clerk. Parsons & Caldwell, attorneys for def'ts. -age 41, Journal 11. Filed June 30th, 1891. A. Reeves Ayres, clerk.

51 In the Superior Court of the State of Washington for the County of Pierce.

ANTHONY P. CARR
vs.
W. H. FIFE *et al.* } Certificate.

STATE OF WASHINGTON, }
County of Pierce, } *ss:*

I, W. H. Fletcher, clerk of the superior court of the State of Washington for the county of Pierce, do hereby certify that the annexed are all the original papers filed in the above-entitled cause, together with a true and correct copy of all journal entries made in said cause, as the same now appears on the records in my office.

Witness my hand and the seal of said court this 25th day of June, 1890.

[SEAL.] W. H. FLETCHER, *Clerk.*

Filed June 30th, 1890.

A. REEVES AYRES,
Clerk U. S. Circuit Court.

52 In the Circuit Court of the United States of America for the Ninth Judicial Circuit, Holding Terms at Tacoma, in and for the State of Washington.

ANTHONY P. CARR, Plaintiff,
vs.
W. H. FIFE *et al.*, Defendants. } Motion.

Comes now the plaintiff in the above-entitled action, by Carroll, Coiner & Davis and John Arthur, his attorneys, and moves the court to remand this cause back to the superior court of the county of Pierce and State of Washington, and assign the following reasons therefor:

I.

That the jurisdiction to try said cause is properly in the said superior court and not in this circuit court.

II.

That all the parties to said above-entitled cause, both plaintiff and defendants, are residents and citizens of the said State of Washington and withing the jurisdiction of the said superior court.

III.

53 That the said cause is an equitable action in relation to real estate situated wholly in the said Pierce county and State of Washington and within the jurisdiction of the said superior court.

IV.

That neither the circuit nor district court of the United States has or would or could have had original jurisdiction of this action.

Dated July, 1890.

CARROLL, COINER & DAVIS AND
JOHN ARTHUR,
Attorneys for Plaintiff, Tacoma, Washington.

(Endorsed:) Motion to remand. Filed July 28th, 1890. A. Reeves Ayres, clerk.

54 In the Circuit Court of the United States for the District of Washington, Western Division.

ANTHONY P. CARR, Plaintiff,
vs.
W. H. FIFE and HARRIET A. FIFE, His Wife; W. J. FIFE and Flora J. Fife, His Wife; Geo. W. Fife and Annie H. B. Fife, His Wife; M. J. Cogswell and Rebecca Cogswell, His Wife; Marion G. Denton, Harry J. Schwinn, J. M. Walden, F. T. Olds, Trustee, and Geo. O. Kelly and A. C. Smith, as Executors of the Last Will and Testament of Edward S. Smith, Deceased, Defendants. } No. 30.

STATE OF WASHINGTON, *County of Pierce*, } *ss:*

I, Anthony P. Carr, being first duly sworn, depose and say: I am the plaintiff in the above-entitled cause. The Honorable C. H. Hanford, the district judge of and for said district of Washington, before whom said cause is to come on for argument on this day, was, since the commencement of this action and until his appointment as such district judge, of counsel herein for the defendants, and in particular for the defendants George O. Kelly and A. C. Smith, as executors as aforesaid.

ANTHONY P. CARR.

Subscribed and sworn to before me this 21st day of November, 1890.

[SEAL.] G. W. H. DAVIS,
Notary Public in and for the State of Washington, Residing at Tacoma.

54½ UNITED STATES OF AMERICA, *District of Washington*, } *ss:*

Be it remembered that at the regular July term, A. D. 1890, of the United States circuit court for the western division of the district of Washington, begun and held in the city of Tacoma, in the county of Pierce, in said district, Honorable C. H. Hanford, United States district judge for the district of Washington, presiding by the direction of Honorable Lorenzo Sawyer, United States circuit judge for the ninth judicial circuit, among others the following proceedings were had, to wit:

TUESDAY, *Nov. 21st*, 1890.

55 ANTHONY P. CARR, Plaintiff,
vs.
W. H. FIFE *et al.*, Defendants.

Now, on this day, comes the plaintiff and moves the court to have this cause tried by the Honorable Lorenzo Sawyer, circuit judge, or, in the event that it be found inconvenient for the circuit judge to try said cause, that the same be certified to the Honorable Mathew

P. Deady, United States district judge for the district of Oregon, and the court, having duly considered the said motion and being fully advised in the premises, overrules said motion, and to which said ruling the said plaintiff excepts, and his exception is allowed.

(Signed) C. H. HANFORD, *Judge.*

56 United States Circuit Court, District of Washington, Western Division.

ANTHONY P. CARR, Plaintiff,
vs.
WM. H. FIFE *et al.*, Defendants.

Opinion on Motion to Remand.

Where the jurisdiction of a circuit court is challenged on the ground that the record does not show the value of the property in controversy to exceed two thousand dollars, that particular point being made for the first time after a final hearing and decree, the property being, in fact, of sufficient value, the court will not deny its jurisdiction, but will allow the omission in the record to be supplied by the filing *nunc pro tunc* of a proper affidavit.

(Syllabus by the court.)

Thomas Carroll, John Arthur, for plaintiff; Galusha Parsons, for defendants.

HANFORD, *J.:*

The plaintiff has heretofore moved to remand this cause
57 to the superior court of Pierce county on the ground that it is not a jurisdiction of this court. That motion was, after full argument, denied, and the reasons therefor are given, in my opinion, upon the merits now on file; and now, after the final hearing and decree in the case, the plaintiff has filed a second motion to remand for the reason that the record does not show affirmatively that the value of the property in controversy is sufficient to bring the case within the jurisdiction of this court, a point not suggested by the first motion.

It is not asserted that the value is not, in fact, sufficient. On the contrary, the land is, and was at the time the suit was commenced, worth many times two thousand dollars, and that fact has been often mentioned and urged upon the attention of the court by counsel on both sides; but — is said that there is an omission in the record of any showing as to the value.

The motion to remand will have to be denied. It cannot be remanded—that is, sent back to the superior court of Pierce county—for the reason that it did not come here by removal from that court. I have already decided that the superior court never acquired jurisdiction of this case, and of course it cannot be remanded to the territorial court in which it was begun, for that court has
58 ceased to be. Besides, there is no lack of jurisdiction in this court. There is only an omission in the record of a fact

essential to the jurisdiction, and the proper thing to do is not to destroy any rights but to supply the omission, and in denying the motion I will also make an order allowing that to be done.

On the day the hearing commenced it was definitely admitted by counsel that the land was of sufficient value, and it was agreed that an affidavit showing the value should be filed and be considered as then filed, and on that understanding the trial was proceeded with. The failure to actually place the affidavit on file has been through inadvertence, therefore I will order that the proper affidavit when made and presented be filed *nunc pro tunc* as of the first day of the trial, and that the motion to remand be denied.

(Signed) C. H. HANFORD, *Judge.*

(Endorsed:) Carr *vs.* Fife *et al.* Opinion on motion to remand. Filed February 25th, 1891. A. Reeves Ayres, clerk.

58½ UNITED STATES OF AMERICA, } ss:
District of Washington, }

Be it remembered that at the regular February term, A. D. 1891, of the United States circuit court for the western division of the district of Washington, begun and held in the city of Tacoma, in the county of Pierce, in said district, Honorable C. H. Hanford, United States district judge for the district of Washington, presiding by the direction of Honorable Lorenzo Sawyer, United States circuit judge for the ninth judicial circuit, among others the following proceedings were had, to wit:

59 MONDAY, *February 23rd*, 1891.

ANTHONY P. CARR, Complainant, }
vs.
W. H. FIFE *et al.*, Respondents. }

This cause coming on to be heard upon the motion of the plaintiff to vacate the decree heretofore entered herein and to remand the cause to the superior court of Pierce county, State of Washington, now, after hearing Thomas Carroll, for plaintiff, and Galusha Parsons, for respondents—

It is ordered that said motion be, and the same is, in all things denied. It is further ordered that respondents have leave to file an affidavit herein as of the date of the 22nd day of November, 1890, showing the value of the property in controversy at the time of the commencement of this action, and the clerk of this court is directed to file said affidavit as of the date aforesaid.

(Signed) C. H. HANFORD, *Judge.*

60 In the Circuit Court of the United States for the District of Washington, Western Division.

ANTHONY P. CARR, Complainant,
vs.
W. H. FIFE *et al.*, Respondent. } No. 30.

STATE AND DISTRICT OF WASHINGTON, *County of Pierce,* } *ss:*

Galusha Parsons, of said county, being duly sworn, says that he is the solicitor of the above-named respondents, and as such appeared before this court upon the motion heretofore made by complainant's counsel to remand this cause; that when said motion was called he required in open court of Thomas Carroll, one of complainant's solicitors, then present in support of said motion, if any question was made as to whether the value of the property in controversy was sufficient to bring the case within the jurisdiction of this court; that deponent further said if any question was made upon that subject he was prepared to show that its value was nearly or quite a million dollars; that said Carroll answered in the presence and hearing of the court that he made no question upon that subject, and added, in substance, that this was probably the
61 most important case that had ever been before the courts of Washington Territory, and further added that the value of the property involved was several hundred thousand dollars, and, as nearly as deponent can now recall the language used, a million dollars more; that upon the argument of this cause upon its merits said Carroll repeatedly spoke of the great value of the property and used language substantially the same as that above stated.

Deponent further says the property in controversy herein is within the corporate limits of the city of Tacoma, and, as he is informed and verily believes to be true, is and was at the time of the transfer of this cause from the State courts of the value of half a million dollars.

GALUSHA PARSONS.

Sworn and subscribed before me by the said Galusha Parsons this 23rd day of February, 1891.

A. REEVES AYRES,
Clerk U. S. Circuit Court, Notary Public in and for the State of Washington, Residing at Tacoma.

STATE AND DISTRICT OF WASHINGTON, *County of Pierce,* } *ss:*

William H. Fife and Myron J. Cogswell, being duly sworn, each for himself says that he was present in this court upon
62 each of the occasions referred to in the foregoing affidavit of Galusha Parsons, and that he distinctly remembers the conversations and statements set out in said affidavit relating to the value of the property in controversy in this suit.

That the same were in substance as stated in said affidavit. Each for himself further says that he is one of the respondents in this action and well acquainted with the value of the property in controversy herein, and that, in his opinion, the same is now and was at the time of the transfer of this cause from the State court of the value of more than half a million dollars.

W. H. FIFE.
M. J. COGSWELL.

Sworn and subscribed before me by the said William H. Fife and Myron J. Cogswell this 23rd day of February, 1891.

A. REEVES AYRES,
Clerk U. S. Circuit Court, Notary Public in and for the State of Washington, Residing at Takoma.

(Endorsed:) Affidavit- of Galusha Parsons and W. H. Fife and M. J. Cogswell. Filed Feb'y 23rd, 1891. A. Reeves Ayres, clerk.

63 In the Circuit Court of the United States for the District of Washington, Western Division.

ANTHONY P. CARR, Complainant,
vs.
W. H. FIFE *et al.*, Respondents. } No. 30.

STATE AND DISTRICT OF WASHINGTON, } *ss:*
County of Pierce,

William H. Fife, Myron J. Cogswell, and Geo. O. Kelly, being duly sworn, each for himself says that he is one of the respondents in this action and well acquainted with the value of the property in controversy herein, and that, in his opinion, the same is now and was at the time of the transfer of this cause from the court in which the same was brought of the value of more than half a million dollars, and that the value thereof at the time of the commencement of this action exceeded one hundred thousand dollars.

WILLIAM H. FIFE.
MYRON J. COGSWELL.
GEORGE O. KELLY.

Sworn to and subscribed before me by the said William
[SEAL.] H. Fife, Myron J. Cogswell, and George O. Kelly this 23rd day of Februayr, 1891.

HARRIS A. CARROLL,
Notary Public in and for the State of Washington, Residing at Tacoma.

64 (Endorsed:) Affidavits. Received copy of the within affidavits this 23rd day of Feb., 1891. Thos. Carroll, of counsel for def'ts. Filed Nov. 22nd, 1890. A. Reeves Ayres, clerk.

In the Circuit Court of the United States for the District of Washington, Western Division.

ANTHONY P. CARR, Complainant,
vs.
W. H. FIFE and HARRIET A. FIFE, His Wife; W. J. FIFE and Flora J. Fife, His Wife; Geo. W. Fife and Anna H. B. Fife, His Wife; M. J. Cogswell and Rebecca Cogswell, His Wife; Marion G. Denton, Harry J. Schwinn, J. M. Walden, F. T. Olds, Trustee, and Geo. O. Kelly and A. C. Smith, as Executors of the Last Will and Testament of Edward S. Smith, Deceased, Respondents. } Notice.

To the above-named respondents and to Galusha Parsons, Esq., their attorney:

You and each of you will please take notice that the complainant herein will call up for hearing and determination before the judge of said court, at the United States district court room,
65 in Tacoma, at the hour of 10 o'clock a. m. on Monday, February 16th, 1891, or as soon thereafter as counsel can be heard, his motion to vacate and set aside the decree herein and remand this cause to the superior court of Pierce county, State of Washington.

Dated at Tacoma, Wash., Feb'y 10, 1891.

THOMAS CARROLL AND
JOHN ARTHUR,
Att'ys for Complainant.

Service of copy hereof is hereby admitted this 10th day of February, 1891.

GALUSHA PARSONS,
Attorney for Respondent.

(Endorsed:) Notice. Original. Filed Feb'y 10th, 1891. A. Reeves Ayres, clerk.

66 (Endorsed:) Filed Nov. 22nd, 1890. A. Reeves Ayres, clerk.

United States Circuit Court, District of Washington, Western Division.

ANTHONY P. CARR, Plaintiff, Appellant,
vs.
W. H. FIFE *et al.*, Defendants, Respondents.

The above-named plaintiff, Anthony P. Carr, conceiving himself aggrieved by the order and decree entered January 28th, 1891, in the above-entitled proceedings, does hereby appeal from said order to the Supreme Court of the United States, and he prays that his appeal may be allowed and that transcript of the record and proceedings and papers upon which said order and decree was made,

duly authenticated, may be sent to the Supreme Court of the United States.

THOMAS CARROLL,
Attorney for Plaintiff and Appellant.

Residence, Tacoma, State of Washington.

TACOMA, —— —, 1891.

And now, to wit, on March 31st, 1891, it is ordered that the appeal be allowed as prayed for.

C. H. HANFORD, *Judge.*

Filed March 31st, 1891.

A. REEVES AYRES, *Clerk.*

67 In the Circuit Court of the United States for the District of Washington, Western Division.

ANTHONY P. CARR, Complainant, *vs.* W. H. FIFE and HARRIET A. FIFE, His Wife; W. J. Fife and Flora J. Fife, His Wife; Geo. W. Fife and Anna H. B. Fife, His Wife; M. J. Cogswell and Rebecca Cogswell, His Wife; Marion G. Denton, Harry J. Schwinn, J. M. Walden, F. T. Olds, Trustee, and Geo. O. Kelly and A. C. Smith, as Executors of the Last Will and Testament of Edward S. Smith, Deceased, Respondents.	No. 30.	Motion.

Comes now said complainant, Anthony P. Carr, and moves the court for an order vacating and setting aside the decree made and entered herein and remanding this cause to the superior court of the county of Pierce, State of Washington, upon the ground that the same was improperly removed therefrom to this court and this court has no jurisdiction of this cause, in this, to wit, that it did not appear at and before the time of said removal that the matter in dispute herein exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and also upon the other and further grounds heretofore alleged in this behalf by this complainant.

THOMAS CARROLL AND
JOHN ARTHUR,
Att'ys for Compl'nt.

Service of a copy hereof is hereby admitted this 10th day of February, 1891.

GALUSHA PARSONS,
Attorney for Respondents.

(Endorsed:) Motion. Filed February 10, 1891. A. Reeves Ayres, clerk.

68 United States Circuit Court, District of Washington, Western Division. In Equity.

ANTHONY P. CARR
vs.
W. H. FIFE *et al.* } Opinion. Filed January 7th, 1891.

A suit in which the plaintiff claims to have acquired a vested right to land by full compliance with the United States homestead law and seeks to obtain a conveyance of the title from defendants, claiming the land under a patent issued to another, is a case arising under the laws of the United States and within the jurisdiction of the United States circuit court.

Such a case, commenced in a district court of the Territory of Washington, and which was pending at the time of the admission of the State of Washington, was transferred to the United States circuit court after the papers and record in the case has passed into the custody of the clerk of a State court and after a stipulation had been signed and filed in said State court whereby the parties agreed to submit the case to said court for its decision and after the defendants had filed in said court a written request to have the case transferred, but before the court had
69 acted upon said stipulation or done any act amounting to an assumption of jurisdiction of the case: Held, that the request was filed in the proper court and was in time, and that a motion to remand for want of jurisdiction must be denied.

The decision in the Supreme Court in Lee *vs.* Johnson (116 U. S., 48) held to be conclusive upon a circuit court in a case involving identical legal propositions, and, without presuming to discuss the questions, held, in accordance with that decision, that in a contested case before the Land Department, the question at issue between the parties being as to the abandonment of a homestead, where the Secretary of the Interior found from the evidence that the contestee was not a *bona fide* homestead claimant, he did not exceed his jurisdiction in directing a cancellation of the entry, although the particular objection to the claim was not raised by the allegations of the contestant.

In a suit by a private individual against the holder of a title to land by patent from the Government only the plaintiff's right can be tried, and questions as to non-compliance on the part of the patentee with the requirements of the law under which the patent was issued cannot be relevant.

In the absence of fraud and where no error is shown in deciding a distinct question of law a decision of the Secretary of the Inte-
70 rior holding a homestead claim to be invalid and directing the cancellation of the entry is final and not subject to review of the courts.

The plaintiff is incompetent to testify as to admissions of a deceased person, through whom the defendants deraign title to the property in controversy, made after having parted with his title in a case wherein some of the defendants are sued in a repre-

sentative capacity as executors of a deceased party who is accused of fraud and conspiracy, such testimony being offered with the object of proving such accusations.

Relief on the ground of fraud cannot be granted upon mere inferences and suspicions.

(Syllabus by the court.)

Thomas Carroll and John Arthur, for plaintiff.

Galusha Parsons, for defendants.

In this suit the plaintiff claims to be the equitable owner of a tract of land to which the defendants have the legal title, derived through one Robert E. Sproule, who obtained a patent for it from the United States.

The plaintiff alleges that he settled upon it in the year 1871 and thereafter acquired a vested right to it by full compliance on
71 his part with the provisions of the act of Congress commonly known as the homestead law and the several acts amendatory thereof and supplementary thereto, and he especially claims the benefits of the laws affecting the homestead rights of persons who were in the military service of the United States during the late civil war. The prayer of the complaint is for a decree adjudging that the plaintiff is the owner of the land; that the defendants hold the title thereto under the patent in trust for him, and for a conveyance of said title to him.

The grounds alleged for this demand are error in law on the part of the officers of the Land Department in issuing the patent to Sproule and fraud on the part of said Sproule and the defendants in procuring the cancellation of his homestead entry.

The case was commenced in 1887 in the district court for the second judicial district of the Territory of Washington, holding terms at Tacoma, and proceeded to a final hearing in that court, but was not decided.

After the admission of the State a stipulation was signed, whereby the parties submitted the case for decision to the superior court of the State of Washington for Pierce county, but said court never acted upon said stipulation and after it had been filed granted a motion made by the defendants to remove the case to this
72 court and the judge signed an order to so transfer it. The plaintiff thereupon filed a motion to remand the case to said superior court for the reason that this court has no jurisdiction in the premises.

I think, however, that this court has jurisdiction and cannot lawfully remand the case. The decision of the case involves the construction and application of the acts of Congress affecting the rights of settlers on the public lands of the United States who seek to acquire title to such lands from the Government. The case therefore is one arising under the Constitution and laws of the United States and one of which this court, if it had been in existence when the case was commenced, might have had jurisdiction. It was pending at the time the Territory of Washington was transmuted into a State. By request of the parties defendant, it has been transferred

to this court. From the facts here stated it follows that by the provisions of section 23 of the enabling act (25th U. S. Statutes, 683) the jurisdiction of this court has attached and is perfect. It is objected that the request to have the case transferred to this court was not made to the proper court and not made in time.

Section 23 of the enabling act referred to prescribes no limitation as to the time within which the request should be preferred
73 and leaves the parties to ascertain for themselves the "proper court" to receive and act upon the request. In this instance the request was made to the State court, which had come into possession of the papers and record of proceedings in the case, and was made prior to any act of the court in relation to the case amounting to an assumption of jurisdiction. The record shows that the first and only act of the State court has been to order the removal of the case to this court.

When the case came on for hearing the plaintiff filed a motion to defer the trial on the ground that the district judge who was presiding, and the only judge of the court in attendance, had been employed by some of the defendants as an attorney on matters not connected with the case since the suit was commenced, though before his appointment to the office. It is not asserted that the judge was legally disqualified, and it is only insinuated that because of transactions in the past he is liable to be partial and incapable of rendering a just decision.

It would result in clogging the operations of the courts and intolerable delays in most cases to adopt the principal that no case can proceed before a judge who at any time may have had any business relationship with any party to it, and it would be mere weak-
74 ness on the part of a judge to refuse to perform the functions of his office merely because of insinuations against his ability to act impartially. For these reasons the motion to postpone was denied and the case proceeded to a hearing upon the merits.

The record shows that in 1873 Sproule was allowed to contest the plaintiff's right to this land, and as the result of said contest, after successive hearings before the register and receiver of the district land office, the Commissioner of the General Land Office, and the Secretary of the Interior, the plaintiff's homestead entry was cancelled on the records of the General Land Office at Washington, and thereafter said Sproule was allowed to enter the land under the provisions of the pre-emption law, and on the 13th of December, 1875, a patent was issued conveying the title to him. Any further or more detailed statement of the facts in the case is unnecessary. In their argument counsel for the plaintiff have taken the position most favorable for him which they could take by assuming that the pleadings and facts shown by the record are such as to present fairly the questions whether the officers of the Land Department had any power to cancel the plaintiff's homestead entry, and whether the defendants are precluded from claiming rights for themselves under the patent by reason of fraudulent practices in obtaining the
75 cancellation of plaintiff's entry. I will, too abbreviate this

decision, make the same assumption and let the decision of those questions determine the case.

As to the first question, contradictory opinions have been given by the courts. On one hand the supreme court of the State of Michigan in an able opinion has sustained fully the plaintiff's argument and contention in this case.

Lee *vs.* Johnson, 47 Michigan, 52.

On the other hand, the same case was taken upon a writ of error to the Supreme Court of the United States and was by the court of last resort, after full argument and due consideration of the able opinion of the supreme court of Michigan, reversed.

Lee *vs.* Johnson, 116 United States, 48.

This last decision meets and overrules every argument made touching this point, and it is conclusive upon this court, so that any discussion of the question here would be idle. I am constrained, therefore, to hold that the Secretary of the Interior had authority to inquire into and decide as to the validity of the plaintiff's claim to this land.

The questions which he was called upon to decide were as to the good faith of the plaintiff; whether he had actually, within the time limited by law, established his residence upon the land with the intention of acquiring it for a home; whether he had continued
76 to actually reside upon the land; whether he was really engaged in improving the land or in good faith intending to do so, or whether he was only making a colorable pretense of residing upon and improving the land for the purpose of stripping it of its valuable timber and acquiring it for speculative purposes without complying with the terms of the homestead law. These are all questions of fact, and the Secretary's decision thereon was final. No other questions appear to have been involved in the contest in the Land Department.

Certainly the case as it has been submitted in this court does not present or disclose any error of the Secretary in deciding a distinct question of law. The fact that no question of law was involved or passed upon by the Secretary is a sufficient answer to the comments made on the circumstance that the Secretary's opinion has never found a place in any of the published reports of Land Office decisions.

The patent to Sproule has been assailed on the ground of alleged failure on his part to comply with the conditions prerequisite to obtaining title under the pre-emption law. It is charged that the overzealous Land Office officials have exacted a forfeiture of plaintiff's rights on insufficient grounds and, with amazing inconsistency, issued a patent to Sproule with undue and unusual haste, although
he never made even a colorable show of compliance with the
77 laws, but this issue cannot come into this case. This is not a suit to destroy the title conveyed by the patent. The plaintiff's object is rather to acquire that title for himself. Unless he can succeed in this it matters naught to him in what manner or to whom

the Government disposes of the land; and, if he is entitled to recover the land, it matters not how fully Sproule may have lived up to the requirements of the pre-emption law. I conclude, therefore, that the action of the Department of the Interior in cancelling the plaintiff's homestead entry cannot be reversed for any mere error.

Next to be considered are the charges of conspiracy and fraud. The most serious specification is that the register of the land office, after the contest, notified plaintiff by letter to the effect that the contestant had failed to prove abandonment and thereby deceived him by leading him to suppose that a decision in his favor had been rendered, whereas the record was made to show that the decision was adverse to him. This is supported by only the plaintiff's *plaintiff's* own testimony—not cor-oborated even by production of the letter—and it is refuted by a letter to the Commissioner of the General Land Office, written by the plaintiff two days after the date of the decision of the register and receiver, in which he sets forth fully his claim to the land and his grievances regarding the con-
78 test, and shows very clearly that he understood then that the case was to be passed upon by the Commissioner. This letter farther shows that the writer of it, instead of enjoying the feeling of self-complacency of a successful litigant, rather indulged in the bitterness of a man while smarting under a consciousness of being the victim of an unjust decision.

In further refutation of this charge, the record shows that the attorneys who had conducted the case for the plaintiff in the land office, and who were then, and are now, men of first-class reputation and eminent in their profession, appealed the case to the Commissioner and after his decision again appealed it to the Secretary and filed their arguments in plaintiff's behalf, which were duly considered. I do not credit the plaintiff's claim that he did not know of the adverse decision or of the appeal taken in his behalf, but, even if he did not know, his rights were as well guarded as they could have been were he fully informed.

The plaintiff's testimony, given after the deaths of Sproule and of E. S. Smith, to the effect that Sproule, after their having parted with all his interest in the land, made certain admissions to the effect that he had been instigated and induced by said Smith to make the contest, is not legal evidence and should be disregarded, but even if — *he* received and uncontradicted, taken together with all the evidence offered on behalf of the plaintiff, it falls a long
79 way short of being sufficient to warrant the court in divesting the defendants of the valuable land in controversy and giving it to the plaintiff. E. S. Smith did not acquire his interests in the land from Sproule, and he did not acquire until several years after the issuance of the patent. In view of this fact, the testimony as to remarks by him to the effect that plaintiff's claim would be jumped, that it ought to be jumped, that the land would be taken from the plaintiff on account of his failure to reside upon it, as the homestead law required, etc., affords no grounds for even an inference that he was a party to any conspiracy to rob plaintiff

of the land by means of unfair or fraudulent practices in the land office.

The defendants other than Smith's representatives acquired their interests in the land by means of foreclosure proceedings against Sproule and execution sales upon judgments against him, which proceedings and sales were several years after the patent was issued. The only ground alleged for charging them with fraud in this matter is that they are known to have been friends of Smith and to have had dealings with him in other matters of business. In short, the court is expected to condemn these parties and strip them of their title to this property on general principles, but the court must decline to meet these expectations.

80 There is no recognized exception to the rule that fraud will not be inferred, and that to obtain relief on this ground the acts constituting the fraud must be distinctly alleged and clearly proven. The only remaining specifications of the charge of fraud are that the case was decided in the Department of the Interior without due consideration of the plaintiff's rights. Both the Commissioner and the acting Secretary of the Interior, who decided the case, have certified that due consideration was given to the case, and against this there is no evidence whatever except the fact that the decision was adverse to the plaintiff. The argument is that with an intelligent understanding of the evidence in the case and the law applicable there could not be an honest difference of opinion as to the plaintiff's rights. I think that I have fairly stated this point, and that in stating it I have sufficiently answered it.

Certainly the court cannot upon mere inference, based upon nothing but a difference of opinion, decree a reversal of the action of the highest officers of one of the executive departments of the Government because of the official misconduct and fraud on the part of said officers.

The plaintiff has failed to make a case entitling him to any relief according to the principles of equity, and, without considering the affirmative defenses pleaded, a decree dismissing the suit with costs must be awarded.

(Signed) C. H. HANFORD, *Judge.*

81 In the Circuit Court of the United States in and for the District of Washington, Western Division.

ANTHONY P. CARR, Complainant,
vs.
W. H. FIFE and HARRIET A. FIFE, His Wife; W. J. FIFE and Flora J. Fife, His Wife; Geo. W. Fife and Annie H. B. Fife, His Wife; M. J. Cogswell and Rebecca Cogswell, His Wife; Marion G. Denton, Harry J. Schwinn, J. M. Walden, F. T. Olds, Trustee, and Geo. O. Kelly and A. C. Smith, as Executors of the Last Will and Testament of Edward S. Smith, Deceased, Respondents. } No. 30.

Decree.

This cause having heretofore been brought on to be heard upon the pleadings and proofs, the complainant appearing by Thomas Carroll and John Arthur, his counsel, and the respondents appearing by Galusha Parsons, their counsel, and the court having duly considered the pleadings, proofs, and arguments, and it appearing to the court that the said complainant has no title or interest in said premises, legal or equitable—

It is ordered, adjudged, and decreed that complainant's bill stand dismissed on the merits thereof, and that respondents recover their costs, taxed by the clerk of this court at 52.40 dollars, and that execution issue therefor.

Done in open court this 28th day of January, 1891.

C. H. HANFORD, *Judge.*

82 (Endorsed:) In the U. S. circuit court. Anthony P. Carr *vs.* W. H. Fife *et al.* Decree. Filed Jan'y 31st, 1891. A. Reeves Ayres, clerk.

United States Circuit Court, District of Washington, Western Division.

ANTHONY P. CARR, Plaintiff,
vs.
W. H. FIFE *et al.*, Defendants. } Petition for an Appeal.

To Honorable C. H. Hanford, judge of said circuit court:

The undersigned respectfully represents that he is the plaintiff in the above-entitled cause; that the value of the property involved exceeds the sum of ten thousand dollars.

That on the 28th day of January, A. D. 1891, a judgement and decree was entered in said cause against him by this court dismissing his bill and for costs, taxed at 52.40 dollars, and that your petitioner believes that he has good grounds for an appeal to the Supreme Court of the United States from said decision, judgement, and decree, and that he is desirous of so appealing, and therefore

83 prays this honorable court to be allowed an appeal from said

decision, judgment, and decree so rendered against him to the Supreme Court of the United States.

ANTHONY P. CARR.

STATE OF WASHINGTON, } ss:
County of Pierce, }

Thos. Carroll, being first duly sworn, on oath deposes and says that he is of counsel for plaintiff, Anthony P. Carr, and that he believes said plaintiff has good legal grounds for an appeal, and that this application is made in good faith and for the purposes of an appeal, as therein set forth, and that the value of the property involved exceeds ten thousand dollars.

THOS. CARROLL.

Subscribed and sworn to before me this 18th day of March, A. D. 1891.

B. W. CONIER,

[SEAL.] *Notary Public in and for the State of Washington, Residing at the City of Tacoma.*

(Endorsed:) Petition for appeal. Filed March 31st, A. D. 1891. A. Reeves Ayres, clerk.

84 UNITED STATES OF AMERICA, ss:

To W. H. Fife and Harriet A. Fife, his wife; W. J. Fife and Flora J. Fife, his wife; George W. Fife and Annie H. B. Fife, his wife; M. J. Cogswell and Rebecca Cogswell, his wife; Marion G. Denton, Harry J. Schwinn, J. M. Walden, F. T. Olds, trustee, and George O. Kelly and A. C. Smith, as executors of the last will and testament of Edward S. Smith, deceased:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be held at Washington, D. C., on the second Monday of October, 1891, purpursuant to an appeal filed in the clerk's office of the circuit court of the United States in the district of Washington, western division, wherein Anthony P. Carr is plaintiff and you are defendants, to answer said appeal and to show cause why the judgment entered in said cause in said circuit court should not be reversed, and that you respond to this citation before the 25th day of May, 1891.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 31st day of March, 1891.

C. H. HANFORD,

Judge of said Circuit Court of the United States, District of Washington, Western Division.

85 Due service of the within citation is hereby accepted.

_____,

Attorney for Defendants.

(Endorsed:) Citation. Due service of the within citation accepted March 31st, 1891. Galusha Parsons, for def't. Filed March 31, 1891. A. Reeves Ayres, clerk.

Supreme Court of the United States.

Know all men by these presents that we, Anthony P. Carr, as principal, and Howard Carr and John N. Fuller, as sureties, all of the county of Pierce and State of Washington, are held and firmly bound unto W. H. Fifea nd Harriet A. Fife, his wife; W. J. Fife and Flora J. Fife, his wife; George W. Fife and Annie H. B. Fife, his wife; M. J. Cogswell and Rebecca Cogswell, his wife; Marion G. Denton, Harry J. Schwinn, J. M. Walden, F. T. Olds, trustee, and George O. Kelly and A. C. Smith, as executors of the last will and testament of Edward S. Smith, deceased, in the sum of one thousand ($1,000.00) dollars; to which payment we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Dated this 25th day of March, 1891.

86 The condition of the above obligation is such that whereas the said Anthony P. Carr, principal, has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment and decree of the circuit court of the United States for the district of Washington, western division, entered on the 28th day of Jannary, 1891, in an action wherein the said Anthony P. Carr was plaintiff and the said W. H. Fife and Harriet A. Fife, his wife; W. J. Fife and Flora J. Fife, his wife; George W. Fife and Annie H. B. Fife, his wife; M. J. Cogswell and Rebecca Cogswell, his wife; Marion G. Denton, Harry J. Schwinn, J. M. Walden, F. T. Olds, trustee, and George O. Kelly and A. C. Smith, as executors of the last will and testament of Edward S. Smith, deceased, were defendants: Now, therefore, if the above-named plaintiff, Anthony P. Carr, shall prosecute his said appeal to judgement and answer all costs if he shall fail to make good his appeal and reverse said judgment, then this obligation shall be void; otherwise to remain in full force and virtue.

ANTHONY P. CARR, [SEAL.]
Principal.
HOWARD CARR. [SEAL.]
JOHN N. FULLER. [SEAL.]

Witnesses:
HOMER C. KOONS.
ANDREW HOMES.

I approve the foregoing bond and securities named therein.
C. H. HANFORD, *Judge.*

(Endorsed:) Bond. Filed March 31st, 1891. A. Reeves Ayres, clerk.

87 UNITED STATES OF AMERICA, } ss:
District of Washington, }

Be it remembered that at the regular February term, A. D. 1891, of the United States circuit court for the western division of the district of Washington, begun and held in the city of Tacoma, in the county of Pierce, in said district, Honorable C. H. Hanford, United States district judge for the district of Washington, presiding by direction of Honorable Lorenzo Sawyer, United States circuit judge for the ninth judicial circuit, among others the following proceedings were had, to wit:

MAY 27TH, 1891.

ANTHONY P. CARR, Complainant,
vs.
W. H. FIFE *et al.*, Respondents.

Now, on this day, on application of the solicitors for complainant, the solicitors for the respondents consenting thereto, it is ordered that the time for filing the transcript of this cause in the Supreme Court of the United States be, and the same is hereby, extended forty days.

C. H. HANFORD, *Judge.*

88 *Index.*

Plaintiff's witnesses.

Name.	Direct.	Cross-ex.	Redirect.	Re-c.
Carr, Anthony P.	2			
Carr, A. P., recalled	29			
Carr A. P., recalled for C. ex.		33	56; R. D., 73	Re-c.,64
Carr, Howard	17			
Hannah, D. B., recall	30			
Hannah, D. B.	23	25	28	
Mahon, Wm.	15			

Filed June 30th, 1890.

A. REEVES AYRES, *Clerk.*

89 In the District Court of the Second Judicial District of Washington Territory, Holding Terms at Tacoma, in and for Pierce County.

Referee's Report.

ANTHONY P. CARR, Plaintiff,
vs.
WILLIAM H. FIFE and Others, Defendants. } No. —.

To the Honorable Frank Allyn, judge of said district court:

Pursuant to an order of this court made in the above-entitled action on the 7th day of September, 1887, appointing the undersigned

a referee to take the testimony in said action and t- r-port the same to this court, now, therefore, I, C. B. Eaton, referee as aforesaid, respectfully report—

That I have been attended by Anthony P. Carr, plaintiff, and William H. Fife and others of said defendants in the above-entitled action; that said plaintiff was also represented by John Arthur, Esq., and Thomas Carroll, Esq., his attorneys, and that said defendants were also represented by T. C. Sears, Esq., and T. L. Stiles, Esq., their attorneys; that said parties and their said attorneys
90 were present at all of the hearings had before me for the purpose of taking testimony in said cause.

That at various times and places in said city of Tacoma, and after the date of the said order appointing me referee as aforesaid, I took the testimony of such witnesses as were produced before me by the respective parties, said witnesses and each and every one of them being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth in relation to their knowledge touching the matters in difference between the parties to said action; that said hearings were closed and said evidence concluded on the 9th day of October, 1888.

I further report that the following-named persons were produced before me as witnesses on behalf of said plaintiff, and that they did, after being first duly sworn as aforesaid, testify as is hereinafter set forth in full, viz:

Anthony P. Carr, William Mahon, Howard Carr, and D. B. Hannah.

That the defendants produced no witnesses and offered no oral testimony; that the documentary testimony produced and offered by the defendants was marked as exhibits in the case and filed herewith as a part of this report.

And I further report that all documents and papers offered
91 by either plaintiff or defendants are also filed herewith, marked for identification as exhibits, and that the testimony hereinafter contained, together with said exhibits, embraces and is all the testimony offered or produced before me by said parties or either of them.

And I further report that the testimony adduced at the several hearings in said action by questions and answers is as follows, to wit:

ANTHONY P. CARR, plaintiff, called for himself and having been first duly sworn, testified as follows:

Direct examination by Mr. ARTHUR:

Question. Are you the plaintiff in this action?
Ans. Yes, sir.
Ques. Are you a citizen of the United States?
Ans. Yes, sir.

Counsel for the defendants objects to the introduction of any evi-

dence from this witness under section 389 of the Code of Washington Territory.

Ques. State whether or not you served in the war of the rebellion.

Objected to by counsel for defendants as irrelevant and incompetent.

Ans. I did.

Q. State for how long a time or term.

Same objection.

Ans. Three years one term, one year another term.

92 Q. You may state whether you were honorably discharged from the Army of the United States.

Objected to by counsel for d-fendnants as incompetent, irrelevant, and that it *si* secondary evidence.

Ans. I was honorable discharged.

Q. You may state whether you have your discharge in your possession.

Same objection.

Ans. I have.

Q. State whether or not you were discharged from each of your terms of service.

Same objection.

Ans. Yes, sir; I was.

Q. (Paper handed witness.) You may state whether or not that is your discharge from your first term of service.

Same objection.

Ans. Yes, sir; it is the original discharge paper.

Q. Is it the original discharge just referred to in your evidence?

Same objection.

Ans. Yes, sir.

Counsel for plaintiff offers the paper referred to in evidence. Paper marked for identification "Pl'ff's Exhibit A, C. B. Eaton, referee."

93 It is stipulated and agreed by and between the parties hereto that the paper just offered in evidence ("Pl'ff's Exhibit A") shall be returned to the plaintiff after a copy thereof has been made by the referee and inserted in his report, and that the copy so made for the purposes of this case shall be used as the original and the same effect shall be given to said copy as would be given to the original.

The paper is in the letters, words, and figures following, viz:

"To all whom it may concern: Know ye that Anthony P. Carr, a private of Captain Dudley's company (B), 19 regiment of Indiana vols., who was enrolled on the 29th day of July, one thousand eight

hundred and sixty-one, to serve three years, is hereby discharged from the service of the United States this fourteenth day of March, 1863, at Baltimore, Md., by reason of disability.

Said Anthony P. Carr was born in Jay county, in the State of Indiana, is twenty years of age, five feet nine inches high, fair complexion, brown eyes, brown hair, and by occupation, when enrolled, a painter.

Given at Patterson Park hospital this fourteenth day of March, 1863.

S. D. FREEMAN,
Surgeon U. S. V., in Charge of Hospital."

94 Question. (Paper handed witness.) State whether or not the paper I hand you is your discharge from your second term of service.

Same objection.

A. Yes, sir; this is the original discharge.

Counsel for plaintiff offers the paper referred to in evidence. Paper marked for identification "Pl'ff's Exhibit B, C. B. Eaton, referee."

Same stipulation as to Pl'ff's Exhibit "A."

The paper is in the letters, words, and figures following, viz:

To all whom it may concern: Know ye that Anthony P. Carr, a private of 1st Lt. Samuel B. Wallace's company (H), 34th regiment of Indiana infantry volunteers, who was enrolled on the 17th day of October, one thousand eight hundred and sixty-four, to serve one year, is hereby discharged from the service of the United States, to date 16th day of October, 1865, to complete his military record under provisions of act of Congress approved July 5th, 1884.

No objection to his being re-enlisted is known to exist.

Said Anthony P. Carr was born in the State of Indiana, is 23 years of age, 5 feet 8 inches high, fair complexion, hazel eyes, light hair, and by occupation, when enrolled, an artist.

Given at Washington, D. C., this 31st day of October, 1864.

GEORGE D. RUGGLES,
Ass't Adj't Gen'l.

95 Question. You may state whether you have ever since remained loyal to the Government of the United States.

Same objection.

Ans. Yes, sir; I have.

—. You may state whether or not you are the same Anthony P. Carr who, on the 28th day of June, 1871, filed in the United States land office at Olympia, Washington Territory, a soldier's homestead declaratory statement and application, number 1368, for the land described in the complaint herein.

Same objection.

Ans. Yes, sir; I am the identical person.

Q. State whether or not you paid to the officers of the land office the legal fees for filing said statement and application.

Same objection.

Ans. Yes, sir; I did.

Q. You may state what you did upon and in regard to that land within six months after the date of filing that statement and application.

Objected to by counsel for defendants as irrelevant and incompetent.

Ans. I went upon the land, worked there, cleared ground, made a road to the land, a wagon road I mean; had lumber and materials hauled in, built a house, and made my residence there.

96 Q. State whether or not you erected any other building than the house that you resided in there.

Same objection.

Ans. The first house that I built was a log house; afterwards I had lumber hauled in and built a plank house with a lean-to addition to it.

Q. You may state the character of that land at that time as to the growth upon it, whether it was prairie or timber land.

Same objection.

Ans. It was heavy timber land, densely covered with underbrush both; no prairie on it; no open ground on it or near it.

Q. State how long you resided on the land and what was the value of the improvements which you made upon it, and also in building a road to it.

Same objection.

Ans. I lived upon the land something over two years, two years and two or three months; the amount of work I done there and had done in making the road to it was worth $800 or $1,000; I wouldn't do it again for $800.

Q. You may state whether or not your residence on the place after your first entry upon it was regular and continuous.

Objected to by counsel for d-fendants as incompetent, irrelevant, and improper, and as calling for a conclusion instead of stating facts.

Ans. I worked there steadily and hard until I got the house in a condition to live in; then I moved my stove, table, chairs,

97 bedding, and household utensils, and made my residence there something over half of the time continuously for about two years, as near as I can remember. I had to work out for a living. I had no money only such as I earned; couldn't make a living there on the land at the time, and had to be away part of the time for the purpose of making a living. The last seven or eight months I lived there almost continuously.

Q. You may state whether you ever proved up or attempted to prove up at the United States land office in Olympia on that land.

Objected to same as before.

Ans. I did; took witnesses to the land office in Olympia; went before the register and told him I came to prove upon my homestead or to make such statements as necessary, and he refused to entertain me at all; wouldn't even talk to me respectably about it; was snappish and short; wasn't inclined to listen to me; in fact told me he was busy; didn't want to be bothered. I didn't see what I could do any further.

Counsel for defendants moves to strike out witness'es answer as improper.

Ques. You may state when that was.

Same objection as before.

Ans. Well, I cannot give you the exact date. It was in the month of May, 1878, or possibly early in June; I think in May.

98 Q. You may state whether the register or receiver or either or both of them gave any reason to you for refusing to entertain your application to prove up.

Objected to same as before.

Ans. Mr. Brown told me—I don't recollect that I talked with Mr. Stewart.

Q. State what position, if any, Mr. Brown held in the land office.

Same objection.

Ans. Mr. Brown was register, and Mr. Brown told me very short he was not aware that I had any homestead.

Q. You may state whether or not you published notice of your intention to make proof, final proof, for that land.

Same objection.

Ans. No, sir; I did not at that time make publication; by newspaper, I mean; no, I did not.

Q. You may state why you did not.

Same objection.

Ans. Well, I don't really know how to answer that. One reason is because I wasn't authorized to by the register, and possibly because of my lack of knowledge at that time.

Q. You may state whether or not you applied to the register to have him publish notice of your intention to make final proof.

Same objection.

Ans. I did make such a request of the register.

Q. You may state at what time that was.

99 Same objection.

Ans. At the time of this call of mine that I have been alluding to, some time in May, 1878, I made that request of him.

Q. You may state whether or not you made claimed credit then to the register or receiver or either of them for your term of service in the Army of the United States.

Same objection and as leading.

Ans. Yes, sir; I certainly did. I understood I was to be allowed my term of service in the army on the land and asked to be allowed that time.

Q. You may state whether or not you were then in possession—that is, in May, 1878—of the land in question.

Objected to for all the reasons above and as leading.

Ans. Yes, sir; I was in possession of it.

Q. State whether or not you had continued in possession from the time of your first establishment of residence there.

Same objection as to last question.

Ans. Yes, sir; my house and household goods were on the land and had never been off.

Q. You may state what you did after the refusal of the land officers to entertain your application to prove up, in May, 1878.

Same objection.

Ans. I returned home to the land and lived there; made it my home and worked there, and stayed there almost continuously for the next six or seven months or eight.

100 Q. You may state whether or not at that time, when you were in the land office—in May, 1878—the land officers or either of them gave you any written refusal of your application to prove up.

Same objection.

Ans. No, sir; they did not give me written objections.

Q. You may state whether or not you asked them for any written statement of their reasons for refusing to entertain you- application.

Same objection.

Ans. I asked the register for some written statement to that effect and he answered me, quite curtly, that it wasn't necessary.

Q. You may state whether at that time and in that matter you were acting under the advice of counsel or were consulting any lawyer as to your rights.

Same objection—immaterial and irrelevant.

Ans. Yes, sir; I was. I had taken legal advise.

Q. I mean in the matter of your offering to prove up. Did you so understand the question?

A. The occasion of this visit in May, 1878; yes, sir.

Q. You may state whether or not you were accompanied by any lawyer or legal counsel in the matter.

Same objection.

Ans. The attorney wasn't with me in the land office at the time of the visit. He wasn't present at this interview between myself and the register.

101 Q. You may state how long after May, 1878, you continued to retain or claim possession of the land in question. Did you ever abandon or surrender possession to anybody, orally or in writing?

Same objection.

Ans. I never relinquished my claim to it. I claimed it continuously, do now and all the time, and never have relinquished any claim to it at any time. I consider it my property.

Counsel for defendants moves to strike out the last sentence of the answer of the witness to the last question.

Q. You may state whether or not you have ever given up or abandoned the possession of the claim to anybody in any manner.

Objected to same as before and that it is leading.

Ans. No, sir; I never have.

Q. State whether or not from the time you first entered upon the land, during the time you resided upon it to perfect your homestead residence, you ever abandoned your residence there for six months continuously at any one time.

Same objection.

Ans. No, sir; I never abandoned my residence there for any period of time.

Q. State whether or not during your residence on the land any contest was made in the land office to prove that you had abandoned the land for more than six months at one time.

102 Objected to same as before.

Ans. Yes, sir; there was such a contest brought.

Q. You may state, if you know, what the finding of the Olympia land office in regard to that question was.

Objected to as incompetent, improper, and irrelevant.

Ans. Some weeks after the trial of the contest held in the land office, and I forget the exact length of time, I received a notice from the register and receiver of the Olympia land office, signed by them, in these words: "We find——"

Counsel for defendants objects to the witness stating the contents of any written paper.

Ans. "We find complainant failed to prove abandonment," were the exact words.

Counsel for defendants moves to strike out the whole of the answer of the witness to the last question.

Ques. You may state whether or not you have that letter from the register and receiver with you now.

Objected to as immaterial, irrelevant, and improper.

Ans. No, sir; I don't have it now.
Q. State what has become of it or where it is.

Same objection.

Ans. It disappeared very mysteriously from among my other papers in the till of my trunk, in my house; where it is I don't know.
Q. State when it disappeared, if you know; when you discovered its loss.

103 Same objection.

Ans. From memory now, merely. I cannot name the exact date; some time during the summer of 1875, if I am not mistaken.
Q. You may state whether or not you instituted a search to find it; and, if so, what was the result.

Same objection.

Ans. I have searched vigilantly and carefully among my papers several different times since then, but as yet I cannot find it.
Q. You may state how you understood that letter from the register and receiver as to your right on the place.

Objected to as irrelevant and improper.

Ans. I positively understood that letter—the information in that letter—as deciding the case in my favor, and so far as I know that was the end of it.
Q. You may state whether you ever applied to the land office at Olympia for a copy of that letter received by you from the officers; and, if so, when and under what circumstances.

Same objection.

Ans. Yes, sir; I went to the land office in person and asked for a copy of the letter (which showed that it had been in the letter press) and I was refused and put off; wasn't allowed to see the letter press. The date I cannot give—when I went there—but I can tell you so that you can know the exact date. It was the very day before the night on which the Olympia land office was burned some
104 year or two ago. I don't know the time; it was that day.
Q. You may state to whom you applied for a copy of the letter.

Same objection.

Ans. I asked the man that I afterwards learned was clerk there; a large man. I think they called him Mr. Schissler; I think that is what they called him, and the register that then was Mr. Gowey, I think, wasn't in, but when I was talking with this Mr. Schissler Mr. Gowey, the register, came in, and I asked Mr. Gowey about it. He had some conversation with others; on what business I know not. Mr. Gowey told me that he would hunt up the book in question and send me a copy to Tacoma. I told him that I was anxious to get it and that I would remain there until I did get it, and, as I well remember, that night the office was destroyed by fire, accidentally.

Q. You may state whether or not Mr. J. T. Brown, the register of the land office at the time this letter was written to you, was present in the office when you made this application for a copy of it.

Same objection.

Ans. Yes, sir; my recollection is that Mr. Brown was there.

Q. You may state whether or not he was in such position as to hear your application and know what you wanted.

Same objection.

Ans. Yes, sir; he certainly was. He stood very near to me; within arm's-length or such a matter. He might have heard what I said if he chose to listen.

105 Q. State whether or not Mr. Brown did anything in connection with the matter at that moment.

Same objection.

Ans. This man, Mr. Schissler, went and got some book in his hand and was bringing it towards me, and Mr. Brown went up to him and said something that I didn't hear, didn't listen to, and Mr. Schissler said, "O, yes; I see; this isn't the book," or the one, or something like that, and went and laid it away on the table. Mr. Brown and Mr. Gowey had some conversation that I didn't hear, and Mr. Gowey then said or repeated that he would furnish me a copy.

Q. You may state if such copy was ever furnished you, either at that or any other time.

Same objection.

Ans. No, sir; it never was.

Q. You may state whether or not that letter which you received from the register and receiver stating that contestant had failed to prove abandonment contained any further statement as to the findings of that office in regard to the contest.

Same objection.

Ans. Well, except the usual complimentary ending and signatures, my recollection is not.

Q. State whether or not a patent for this land has ever been issued to you by the United States so far as you know.

Same objection.

Ans. No, sir; not that I know of.

106 Cross-examination waived by T. C. Sears, Esq., attorney for defendants.

ANTHONY P. CARR.

Subscribed and sworn to before me this 23rd day of November, 1887.

C. B. EATON, *Referee.*

WILLIAM MAHON, called for the plaintiff, and having been first duly sworn, testified as follows:

Direct examination by Mr. ARTHUR:

Question. State your name, age, residence, and occupation.

Answer. My name is William Mahon; I am about forty years old; my occupation is farmer, and I reside in Pierce county, Washington Territory.

Ques. How long have you resided in Pierce county?

Ans. Since 1849, sir.

Q. You may state whether or not in the year 1871 or thereabouts you knew the plaintiff in this action, Anthony P. Carr.

A. Yes, sir.

Q. You may state whether you know the land in controversy in this action called Smith & Fife's addition out here in section 8.

A. I know some of it, sir. I never was all over it to know it all.

Q. You may state whether or not you know that part of it upon which plaintiff filed a homestead entry, the W. ½ of the
107 N. E. ¼ and the E. ½ of the N. W. ¼ of sec. 8, t'p 20 N. of R. 3 E.

Objected to by counsel for defendants as immaterial, irrelevant, improper, and incompetent.

Ans. I suppose I do. I know about where the house is built.

Q. State whether you did any of the work in building the house for the plaintiff on that place.

Same objection.

Ans. I didn't help build the house.

Q. You may state whether in the year 1871 or thereabouts you hauled any lumber for the plaintiff to that land.

Same objection.

Ans. Yes, sir, I did.

Q. State all that you did in connection with that matter.

Same objection.

Ans. I helped to make the road, and, to the best of my knowledge, I think I hauled two loads of lumber over the road and one load of shingles.

Q. State whether this was done for the plaintiff.

Same objection.

Ans. Yes, sir.

Q. State, if you know, how that lumber was used.

Same objection.

Ans. I don't, sir. I hauled it on the ground, and that is all I know of it.

Q. About how much lumber and shingles did you haul for the plaintiff?

108 Same objection.

Ans. Well, sir, that is something I cannot tell. I suppose I hauled in the two loads from 500 to 700 feet to the load—between a thousand and fifteen hundred feet in all; I am not positive; and I guess, maybe, four or five thousand shingles, in the neighborhood of that, to the best of my opinion.

Cross-examination waived by Mr. Sears, counsel for defendants.

WM. MAHON.

Subscribed and sworn to before me this 28th day of November, 1887.

C. B. EATON, *Referee.*

HOWARD CARR, called for the plaintiff, and having been first duly sworn, testified as follows:

Direct examination by Mr. ARTHUR, attorney for plaintiff:

Question. State your name, age, residence, and occupation.

Answer. Howard Carr; 40 years old; residence, Tacoma, 1st ward; policeman at present.

Ques. State whether you know the plaintiff in this action.

Ans. I do.

Q. State what, if any, relationship you bear to him.

A. He is a brother of mine.

Q. State, if you know, whether he served in the Army of the United States during the late rebellion.

Objected to by counsel for the defendants as irrelevant and immaterial.

109 Ans. He did.

Q. State, if you know, for how long a period.

Same objection.

Ans. He first enlisted for three years, if I remember correctly.

Q. State for how long a time the second enlistment was for.

Same objection.

Ans. I don't know.

Q. State if you know that he did enlist a second time.

Same obj.

Ans. Yes.

Q. State whether or not he served under that enlistment.

Same obj.

Ans. He did; I was present when he came home from the army the second time.

Q. State, if you know, whether or not he was honorably discharged from the service on each of those terms of enlistment.

Same obj.

A. I have seen one of his discharges along a good many years ago; I don't know whether I ever saw the other or not; I might have seen one of them twice or both of them; I know I have seen one of them. We compared our discharges once, his and mine and father's.

Q. State as nearly as you can about the whole term of his service.

Same obj.

A. About three years, as near as I remember. It may be over that.

110 Q. You may state, if you know, what his disposition to the Government of the United States has been since his service in the army—whether it has been loyal or disloyal.

Same obj.

Ans. Entirely loyal.

Q. State if you know the land in question here.

Same obj.

Ans. I do.

Q. State if you know of plaintiff's having resided on that land.

Same obj.

Ans. Yes, sir; I do.

Q. You may state, if you know, when he established his residence on that land.

Same obj.

Ans. I do not remember the exact date he got his house built; I was out there off and on for years, and his house was there; I went out with him sometimes and stayed over night and then I would go home.

Q. You may state, if you know, how soon after filing on the claim he began his residence there.

Same obj.

Ans. I don't know when he filed. I helped to make the road and get the lumber out to the house and helped to build a house. How long before that he filed I don't know. He might have filed after, for all I know.

Q. How much of a road did you build there?

111 Same obj.

Ans. Half a mile of road.

Q. Through what sort of country?

Same obj.

—. It was pretty rough; all the country there was pretty rough and hard to get through—hard to work; it was all timbered.

Q. You may state, if you know, what improvements plaintiff made on the land.

Same obj.

Ans. He had a house—a board house—there; I don't know the size of it; probably 16 by 20, or about that, with a kitchin on, and some clearing there. He set out some apple trees, or had some set out, and he had some potatoes raising there one time when I was out—in May or June, I think it was—and some fencing up; kept a horse, I believe, in a corral, as he called it; that is all I took particular notice of in that immediate vicinity; what he had elsewhere I do not know.

Q. State, as nearly as you can, what the reasonable value was of all the improvements which you saw there, including the road which you built to it, clearing and houses and road.

Same obj.

Ans. Well, at the time I remember distinctly of being there I presume the improvements at that time, would cost somewhere about 400 or 500, at that time, what I saw then.

112 Q. You may state whether or not the plaintiff continued to reside and possess the place after that time.

Same obj.

Ans. Well, after that I don't think I was ever there when he was there. I have seen him going past my house back and forth in going to town and back. He would go past where I lived then from his place to town—old Tacoma. He used to stop at my place when he was going out home; I *promise* he went there; that was during the latter part of the time that he was living there that I allude to now; way after the contest.

Q. You may state, to the best of your recollection, how long the plaintiff resided on the place.

Same obj.

Ans. Well, I don't know; I know that in about 1871 there was times that I never saw the place. There might have been a year, say about 1876, I don't think I was there at all but at intervals. I saw him there at intervals between 1872 and 1878; all the different years except 1876, when I was not there.

Q. You may state whether or not you know of any attempt on plaintiff's part to prove up on the land at the Olympia land office.

Same obj.

Ans. Yes, sir; I do.
Q. State what you know about it.

Same obj.

113 Ans. My brother, my father, and myself went up to Olympia for that purpose.
Q. Your brother, the plaintiff?

Same obj.

Ans. Yes, sir.
Q. State when.
Ans. That was some time in the early summer of 1878.
Q. State all you know about it.

Same obj.

Ans. Well, I went to the land office; my brother spoke to the register; said he had cope to prove up. The register, after talking with him some, turned round to him, and says he, "You have got no land to prove up on." I turned round and went out. I had no confidence when I went up, and so told him, because it was understood by a good many of us that he was sold out before that, so that I had no confidence, and I turned and walked out; left my father and brother in there.
Q. You mentioned your father in your answer?
A. Yes, sir; he was up there to Olympia with us.
Q. You may state whether he is now alive or not.
A. No; he is not.
Q. You may state how long your father has been dead.
A. He died the 10th of last August.
Q. You may state whatever you know as to your brother, the plaintiffs, claiming the place under a soldier's homestead claim at that time and to the local officers.

114 Objected to as before.

Ans. He did; always claimed the land; always said it was his.

Cross-examination waived by Mr. Sears, attorney for defendants.

HOWARD CARR.

Subscribed and sworn to before me this 9th day of October, 1888.

C. B. EATON, *Referee.*

Counsel for plaintiff offers in evidence land office receiver's receipt for legal fees on filing of plaintiff's homestead application.

Objected to by counsel for defendants as incompetent, irrelevant, and immaterial.

Receipt marked for identification "Pl'ff's Exhibit C, C. B. Eaton, referee." Same stipulation as to Exhibits "A" and "B."

The receipt is in letters, words, and figures following, viz:

"Homestead.

Duplicate Receiver's Receipt No. 1368; *Application No.* 1368.

RECEIVER'S OFFICE, OLYMPIA, W. T., *June 28th*, 1871.

Received of Anthony P. Carr the sum of twenty-two dollars — cents, being the amount of fee and compensation of register and receiver for the entry of W. ½ of N. E. ¼ and E. ½ of N. W. ¼ of section 8, in township 20 north, of range 3 east, under the acts of Congress approved May 20, 1862, and March 21, 1864, entitled 'An act to secure homesteads to actual settlers on the public domain.'

$22.00. F. M. LAMPER, *Receiver*."

115 On the margin, in red ink, is written, "Act July 15th, 1870."

On the back of the paper is endorsed, in writing, "Recorded in auditor's office of Pierce Co., W. T., Sept. 15, 1879 (or 1877), at 11 a. m., at page 333 of Deeds, records W. T. Geo. B. Kandle, county auditor."

DOLPH B. HANNAH, called for the plaintiff, and having been first duly sworn, testified as follows:

Direce examination by Mr. CARROLL, of counsel for plaintiff:

Question. Are you acquainted with the plaintiff, Anthony P. Carr?

Ans. Yes, sir.

Q. Do you know the land, plaintiff's homestead entry, described as W. ½ of N. E. ¼ and E. ½ of N. W. ¼ of section 8, township 20 north, of range 3 east, now known as Smith & Fife's addition to Tacoma?

A. Yes, sir.

Q. How long have you lived in or near Tacoma?

A. Well, I came here in December, 1872, first.

Q. Did you know E. S. Smith?

A. Yes, sir.

Q. I will ask you if you ever, about May, 1873, at Kalama, W. T., heard a conversation between E. S Smith and others—and, if so, who—with reference to this land. If so, state all you heard them, say about it.

Objected to by counsel for defendants as incompetent, irrelevant and indefinite.

116 Ans. I did hear persons talking about it. I heard Smith talking about it and others; about the claim.

Q. What did Smith say about it?

Same obj.

Ans. He said somebody ought to jump it.

Q. Anything else?

Ans. Well, I heard Smith and Starr and half a dozen others talk about it lots of times, and about his not having his family on his

claim, and that his claim could be jumped and ought to be jumped; ought to be taken away from him.

Q. Do you know how they came to talk about it at Kalama at that time?

Same obj.

Ans. No. I can tell you, if you want me, what I told Carr about it.

Q. I will ask you if they said anything at that time whether they were going to jump it; any of these parties.

Same obj.

Ans. Well, they said it would be jumped; they didn't say who would jump it; they said it would be jumped and he would loose it; that is what they said; it was said different times.

Q. I am confining this inquiry now solely to this conversation at Kalama.

A. That conversation at Kalama—as far as that was concerned, there was parties present that heard the conversation, I suppose. I don't know whether they did or not. They were playing
117 billiards with Smith, but I don't know whether they heard it or not. I hadn't ought to have heard it, because they were talking their own matters over and I had no business to hear it.

Q. What was that conversation, to the best of your recollection?

Same obj.

Ans. The conversation was just this: that Carr wasn't living on his claim according to law—that is, that his family wasn't on it; that was the proposition; he thought it would be jumped; would be taken away from him; that he ought to lose it; that was the conversation; that was repeated several times in my presence both at Kalama and at Tacoma, more at Kalama than at Tacoma, so far as that is concerned.

Q. I am confining you to the conversation at Kalama; you knew Anthony P. Carr at that time, did you?

A. Yes, sir.

Q. I will ask you if you made any effort or made any move towards filing on that claim.

Objected to by counsel for defendants as immaterial and incompetent.

Ans. I did.

Q. I will ask you what you know about Carrs living on his claim at that time, if anything.

Objected to as incompetent and irrelevant.

Ans. All I know about his claim I used to go out there hunting, you know, and see him there on his claim, and used to see
118 him carrying provisions in and out from there; that is all.

Q. About when was that?

A. That was in the spring of 1873.

Q. Do you know anything about his living on the claim in 1874 and from that time extending on up to 1878?

Same obj.

Ans. No; I can't say anything definite about his living on it after 1873.

Cross-examination by Mr. SEARS, attorney for defendants:

Ques. Who was present at the conversation at Kalama to which you have referred?

Answer. Well, General Sprague was playing billiards with Mr. Smith that night, and whether they were together when that conversation took place or not I don't know; there was a number of persons there and some of them I didn't know.

Ques. Did you know any of them except General Sprague and Mr. Smith?

Ans. Yes; there were some of the conductors that I knew around the room that night; maybe that man Sproule was there; I didn't know him at all.

Q. You don't know that he was there, do you?

Ans. No; I don't know anything about it.

Q. Do you know whether Mr. Starr was there or not?

A. No, sir; not then.

Q. Then the only persons there that you know were Mr. Smith and General Sprague?

119 A. They were playing billiards in the billiard-room. I couldn't say whether they were playing when the conversation took place or not. There was a number present at the time, I know.

Q. Were they engaged in playing the game of billiards when the conversation took place?

A. I don't think they was.

Q. Was this conversation held in the billiard hall?

A. I am not certain about that.

Q. Where were you?

A. I was in a room next to the billiard-room.

Q. You were not, then, in the billiard-room at the time of this conversation?

A. No, sir; the door was open through into the billiard-room—where I was into the billiard-room.

Q. Could you tell by whom the words were said—by Smith or General Sprague or by the other persons?

A. Mr. Smith did most of the talking about it.

Q. Did you hear him say this that you have testified to?

A. Yes, sir.

Q. You only know that Mr. Smith said this from hearing his voice and not from seeing him when he was talking, do you?

A. O, yes; I saw him and heard him, too. That ain't the only time I heard him.

Q. I am talking about this conversation at Kalama. Now, then,

if you saw Mr. Smith at the time you heard this conversation
120 I wish you would tell us who he was directing the conversation to and who were present when you heard that conversation and heard it.

A. I can't tell who was present, only Mr. Smith and General Sprague were playing billiards.

Q. Were they playing billiards at the time of this conversation?

A. I can't say.

Q. You were where you could see, were you not?

A. Yes.

Q. Who was the conversation addressed to?

A. I wouldn't say who it was, because there were strangers in the room.

Q. He gave as a reason for it, then, that Carr didn't live on the claim, and that it ought to be jumped for that reason—that he was not entitled to it as a homestead?

A. Yes; that he didn't have his family on the claim.

Q. That was the only reason given, was it not?

A. That he ought not to hold the claim; had no *tight* to hold it.

Q. Did anybody make any reply to that?

A. Well, I don't know; I don't recollect. I might have made a reply to it for all I know. I did talk to Smith about it, and I can't tell whether I done it that night or not. I did at other times.

Q. How long after this conversation was it that you attempted to file on the claim?

A. I didn't attempt to file on it. I attempted to get hold
121 of the land by going to Carr and trying to buy him off.

Q. How long was that after this conversation?

A. Right immediately—a day *or* two afterwards—just a few days afterwards. I think I came home the next day.

Q. Then you tried to get the land yourself?

A. Yes, sir; I tried to buy him off.

Redirect examination by Mr. CARROLL, of counsel for plaintiff:

Question. I understood you to say that that was a stranger that Mr. Smith addressed his conversation to?

Objected to by counsel for defendants as assuming a fact that isn't in the testimony.

Ans. I didn't say it was a stranger. I said there were strangers in the room at the time, and General Sprague was in there, too, at that time.

D. B. HANNAH.

Subscribed and sworn to before me this 9th day of October, 1888.

C. B. EATON, *Referee.*

ANTHONY P. CARR, recalled for himself, testified as follows:

Direct examination by Mr. CARROLL, of counsel for plaintiff:

Question. What, if any, improvements were made by you on the property in question after the time of the entering of this contest by Robert E. Sproule?

Answer. Why, I made them; most of the improvements after that.

Q. What was the character of the improvements?

122 Ans. Part of the house. The addition on the house was built after that, and I dug a well after that, and nearly all of my slashing and clearing was done after that; because I hired men to work for me is the way that I remember particularly that it was done after that.

Mr. CARROLL: "You may cross-examine."

Judge SEARS: "I desire to reserve, with the consent of the counsel for plaintiff, the right to cross-examine Mr. Carr at any future time before the case is closed."

Mr. CARROLL: "Certainly, that is all right."

Closed.

ANTHONY P. CARR.

Subscribed and sworn to before me this 9th day of October, 1888.

C. B. EATON, *Referee.*

DOLPH HANNAH, recalled for plaintiff, testified as follows:

Direct examination by Mr. CARROLL, of counsel for plaintiff:

Question. In your testimony the other day you spoke of overhearing a conversation between E. S. Smith and some other parties. I want to know whether or not the E. S. Smith to whom you referred is the same E. S. Smith who owns a part of or whose estate is interested in the property now known as Smith & Fife's addition.

Answer. My understanding is that it is the same man. I never knew any other E. S. Smith.

123 Ques. You also spoke at that time of Mr. Ainsworth, J. W. Sprague, and L. M. Starr. I wish you would state what, if any, relationship those men held to the Northern Pacific Railroad Company at that time, if you know.

Objected to by counsel for defendants on the ground that it is irrelevant, incompetent, and immaterial.

Ans. My understanding from Mr. Smith was that the land he was buying and getting hold of there was for the railroad company.

Counsel for defendants moves to strike out the whole of witness's

answer on the ground that it is not responsive to the question and as not being a statement of any fact.

Ques. Please read the last question to the witness.

Question read.

Ans. Well, one of them was an officer of the railroad company—Ainsworth was an officer of the railroad company—and I understood Mr. Smith to be connected with the railroad company, as I stated, buying land off and on for them.

Q. At the time or about the time of this conversation that you have referred to with these parties did you have knowledge of the probable value of this land in controversy—at that time?

Objected to by counsel for defendants on the grounds that it is immaterial, incompetent, and irrelevant.

Ans. Yes, sir; I did.

Q. What do you say its probable value was?

124 Objected to by counsel for defendants on the same grounds, that it is immaterial, incompetent, and irrelevant.

Ans. Well, I could hardly say what its value would be. I tried to buy the land from Mr. Carr, his right to it, and he asked me $30,000 for it, and I didn't think it was worth it and I didn't buy it.

Counsel for defendants moves to strike out the answer of witness and the whole thereof as incompetent, immaterial, and irrelevant and as not being responsive to the question.

Ques. State what, in your judgment, that land was worth at that time.

Objected to by counsel for defendants as immaterial, irrelevant, and incompetent.

Ans. I considered the land worth about $10,000. I would have given that for it.

Q. About that time were you negotiating, in connection with Messrs. Smith, Ainsworth, Sprague, Starr, and others, or under instructions from them, with Mr. Carr for a donation of forty acres of land to the Northern Pacific Railroad Company?

Objected to by counsel for defendants on the grounds before stated.

Ans. I was negotiating—that is to say, I was requested by Mr. Starr and also by Mr. Smith, in Tacoma, to go to Mr. Carr and see if I couldn't get him to extend the time of the location of the
125 terminus of the Northern Pacific railroad from June until into July—some time in June into August or July, I think it was—and I went to Mr. Carr and plaintiff's house. He was not at home. I walked up town with his wife and talked the matter over with her.

Counsel for defendants moves to strike out the answer of the witness and the whole thereof as irrelevant, immaterial, and incompetent and as not responsive to the question.

Q. Please read the *w*uestion to this witness. (Question read.) Please answer my question.

A. I was negotiating.

Q. You may state what the nature of the negotiation was.

Objected to by counsel for defendants on the grounds heretofore stated.

Ans. The nature of the negotiation was that Mr. Starr, Mr. Smith, and myself discussed this matter over and I was sent by them or requested by them to go to Mr. Carr and negotiate for this extension of time, as I stated before. I went and he was not at home and I requested his wife to use her influence with him to get him to extend the time, and that is just what I done, exactly, in the matter.

Q. Well, what was that extension of time for—that is, why was Mr. Carr asked to grant an extension of that time, if you know?

Objected to by counsel for defendants on the grounds heretofore stated.

Ans. Why, my understanding was that they wanted him
126 to make an extension of time for the location of the terminus, so as to cover the land that they had agreed to *to* bring the terminus in at a specified time; that was my understanding at the time; that is what I went for.

Q. Do you know whether or not he agreed to that extension of time?

Objected to by counsel for defendants on same grounds as before.

Ans. Didn't agree to it with me. I didn't see him at the time at all.

Q. Do you know whether or not there was a lawsuit grew out of that between the parties?

Objected to by counsel for defendants on the grounds heretofore stated and on the further ground that it is not the best evidence that the records of the court will show.

Ans. I believe I was in the court-room here and heard the examination of witnesses in a suit that grew out of it. I wasn't a witness. I happened to be in there.

Q. How far is the land in controversy from the passenger depot of the Northern Pacific railroad terminus at Tacoma—the depot at Pacific avenue?

Objected to by counsel for defendants as immaterial, irrelevant, and incompetent.

Ans. I don't know exactly how far it is. About half a mile, I think, to the first line. I am not sure about it. It may be three-quarters of a mile.

127 Mr. CARROLL: "You may cross-examine."

Judge SEARS: "I desire to reserve the right to cross-examine this witness until some future time, if I conclude to do so at all, which is not probable."

Mr. CARROLL: "That is satisfactory to us."

D. B. HANNAH.

Subscribed and sworn to before me this 9th day of October, 1888.

C. B. EATON, *Referee.*

Mr. CARROLL, of counsel for plaintiff: "The plaintiff rests on the understanding that we shall have the privilege of filing any official documents or record evidence that we may wish, subject, of course, to the defendants' objections to its competency."

Plaintiff rests.

128 TACOMA, W. T., *April 20th*, 1888.

Hearings for the purpose of taking testimony in this matter being resumed on this date at the office of Judge Sears, Mr. T. L. Stiles appeared as counsel, with Judge Sears, for the defendants.

Mr. Carroll appeared as counsel for the plaintiff.

ANTHONY P. CARR, plaintiff, was recalled by defendants for cross-examination by Mr. STILES:

Question. At what date precisely did you first go upon the land after June 28th, 1871?

Answer. It might have been the very day after or two or three days after; within a day or two; a very short time.

Ques. What was your first act of settlement?

Ans. The first thing I done was slashing brush and clearing.

Ques. When did you commence that work?

A. About a week before I went to Olympia to notify. I went there and made clearing and slashing.

Q. How long did you continue that work?

A. Right along for a course of three or four months.

Q. What do you mean by slashing?

A. Cutting away the underbrush; it was very brushy ground; timber and brush both; cutting away brush and small trees, chopping logs and rolling them out of the way; clearing a place to put up a house.

Q. Over what area did you do the slashing?

A. The first slashing piece I done, I should judge there was a quarter of an acre that I cleaned. That was where the house
129 was; where I built the house.—C. E. Carr, A. P.

Q. Was that quarter of an acre where you built the house the log house or where you built the frame house?

A. Where I built the lumber house. The log house had, perhaps, not quite so big a place of clearing there; a small place, one-eighth of an acre, where I built the log house, that I cleaned.

Q. Previous to your first going upon this land where did you reside?

A. In Tacoma, now called the First ward.

Q. Precisely on what portion or lot of the First ward did you live?

A. On my father's house, on lot 4 I think it is, and I think it is block 7. If I am not mistaken it still stands there.

Q. How long had you resided in Tacoma?

A. I first came to Tacoma about the 20th of November, 1866.

Q. Did you own any property there?

A. At the time I first came here do you mean or at the time of this settlement?

Q. June 28th, 1871.

A. Yes; I did.

Q. What did it consist of?

A. I owned 20 acres in section 32 and two lots, 5 and 6, I believe was their numbers, in block—well, I won't state the block; I may be mistaken. I have got that a little out of my mind, the
130 number of that block. It might have been block 12, and maybe I am mistaken about that.

Q. To whom did the house in which you lived belong?

A. As I said before, I lived in my father's house first—Job C. Carr. Then I built a house for myself and moved in that.

Q. I am talking about this date—June 28th, 1871.

A. At that time I lived in my own house.

Q. Where was that house situated?

A. That was on lot 4, in block 6, if I am not mistaken.

Q. What family had you then?

A. Wife and one child.

Q. How long had you been married?

A. I was married the 20th day of May, 1869.

Q. Had your family been living there with you in your house?

A. Yes, sir.

Q. Observe, Mr. Carr, that I am speaking all the time of this date, June 28th, 1871, the date you made your filing. If I want anything else I will call your attention to it. What business had you been engaged in at Tacoma, and where was your place of business?

A. No business. I done anything I could get to do to make a living. Most of the time I worked on my place—my homestead; done any odd jobs I could get to do—papering, paintin*d*, working for the Tacoma Mill Company; anybody about town.

Q. Had that been your employment for some time previous to June 28th, 1871?

A. Yes; miscellaneous work; yes.

Q. Did you have any domestic animals at Tacoma; and,
131 if any, what did they consist of? Give their number and value.

A. No, sir; I had none at all.

Q. After your filing upon this land, June 28th, 1871, what, if any, change was made in the family residence?

A. Well, I don't understand exactly. I don't know as there was any change made.

Q. Did your family continue to live in that same house?

A. Oh, no; not all of the time. As much of the time as I could I lived on the homestead, but I had no means of subsistance except my daily labor, and I had to work in town, you see. It was wild woods. I had to be in town and my wife wouldn't stay there alone. When I had a job of work to do—and I generally did it, too—then we would stay in town and I would go back to my homestead as I could.

Q. Did you keep the house in town furnished for occupation as it had been theretofore?

A. Partly. Part of my things I took to my homestead, part were in town; so that it was used as I said. When I had to be in town I could stay at home.

Q. Where did your family ordinarily take their meals, sleep, and have the bulk of their effects?

A. The most of my things were at the homestead. I took my cook stove there and then I had a small box stove that we made out with in town when we came in, and my bed and bedding, and the chairs and rocker, and you might say the bulk of my things, were at the homestead; but then there were some blankets and
132 some things—mats, matting; enough to get along with when I had to come to town.

Q. Now, what portion of time for the first year after June 28th, 1871, did you have to be in town and did you and your family stop at your house in town?

A. Well, I should judge we were in town probably a third of the time; not four months continuously, you understand, but by intervals; more than half the time I spent on the homestead.

Q. How was it with respect to the next year, up to June 6th, 1873?

A. Well, I stayed on the place, I should judge, about or a little more than half the time the next year; my necessities were increasing and I had to meet them.

Q. You say you stayed on the place. What do you mean by "the place"?

A. I mean the homestead in question when I say "place." I had considerable more expense to me. It is very easy to find out where I worked, who for.

Q. During the time that you say you spent on the homestead, what were you doing?

A. Clearing, cutting brush, burning it, cutting logs, burning them.

Q. Did you have any one during that time assisting you; if so, who?

A. No; I wasn't able to hire anybody; my wife's father was there.

Q. What was his name?

133 A. Mr. Mart. Bird. I judge he worked there two or three weeks; lived with me; eat and slept at my house.

Q. As the result of your labor during these two years, what portion of this land had been cleared, if any?

A. I measured off a five-acre piece running along a swale and

got that very nearly cleared excepting big stumps, what in this country they call clearing.

Q. Describe the location of Tacoma—that is, with reference to its distance from this land and the kind of place it then was.

A. Tacoma then—what was then Tacoma—was in the southeast quarter of section thirty, town. twenty-one, range three east, and this piece of land was in section eight, township twenty south of it and distant, I should judge, about two miles; I think across two sections. This is merely from memory. I have not looked at a map for a long time.

Q. How large a place as to population was Tacoma then?

A. Including the Tacoma mill, which was right adjoining Tacoma, I should judge there were altogether 250 or 300 people.

Q. What was the nature of the business that was done there?

A. Very little outside of the Tacoma Mill Company's business.

Q. Just go on and state what that was.

A. Lumbering company; lumber-cutting.

Q. After the time of your alleged settlement on this land, is it not true that your family life at Tacoma went on just as before, except that you spent some time there, took some meals there, and occasionally stopped over night?

134 A. No, that is not the case; it didn't go on just the same because my business was more divided and upon my homestead, as a matter of course.

Q. If this is not true state fully in what respects it is not *reue*.

A. Before I notified on the land I was in Tacoma altogether and my family; after I had notified on the land myself and my family was on the homestead. That is why it is not the same as it was before.

Q. In what particular portion of this tract was the land which you say you cleared—the five acres?

A. Well, I can't give you now, from memory, and I have not a plat of it. I couldn't tell you which forty it was on; it was west of the lumber house—adjoining and west of the lumber house.

Q. In what portion of the tract was the lumber house?

A. That is what I can't tell you—which 40 it was on. I can't tell you now from memory. I don't know which side of the division line it was on; it was near the line.

Q. You cannot tell which of the 40's it was on?

A. It was the N. E. ¼ of the N. E. ¼ or the N. E. ¼ of the N. W. ¼, and which of these 40's the house was on I could not tell.

Q. You say, however, that it was near the line between the two?

A. Yes, but I don't know exactly which one it was on; I never run the dividing line between the two 40's; I run around

135 two sides of the outside of the claim, but not through the centre of it.

Q. Was it nearer the north or the south line of the quarter section?

A. It was nearer the north line.

Q. You say the clearing was upon or about a swale.

A. Yes.

Q. Was there more than one swale in the tract?

A. Yes, there was two large swales in the tract. I know they are on the land from having measured outside boundaries, but on what 40 or 40's the swales are on, that I couldn't tell you.

Q. How do the swales lay with reference to each other—east and west, north or south?

A. One lays mostly east and west; I think they both do. One is at a little angle with the other, and I have not been on the land for quite some time. I only speak from memory now.

Q. How far were the two swales apart?

A. Well, going through the heavy timber and brush, then, it is hard to give a reasonable guess now; perhaps all the way from 20 to 40 rods.

Q. Was the one that you worked about to the northward or southward, the eastward or westward of the other one?

A. It was. I was on the westernmost one, the largest one; the largest swale is the west one—that is, it seemed so to me then in going through the woods and heavy brush.

136 Q. Did you prepare any of that ground so that it could be planted to any agricultural crop?

A. I cleared it and planted potatoes and corn and turnips and other garden stuff—cabbage and so forth. I know the deer eat the most of it up for me, except potatoes.

Q. How large an area did you use in that planting?

A. Well, an ordinary garden, I should suppose. I judge $\frac{1}{8}$ or $\frac{1}{4}$ of an acre, at least.

Q. Did you plant more than once?

A. Yes; I planted two seasons.

Q. Did you harvest any of the crop either season?

A. Not of any great value. As I told you before, the deer eat everything up almost, but the potatoes. I reset cabbage, I judge, three or four times, but they eat them up. I used what potatoes I wanted. I should judge I used four or five bushels.

Q. Of potatoes?

A. Yes, sir.

Q. How near was your house to this garden?

A. I judge it was 150 or 200 yards.

Q. Was your house in sight of the garden?

A. Yes; there was a small ridge with some intervening bushes that I didn't clear because I wasn't using the ground—fir bushes; but then from what I called the garden you could see the house.

Q. During the time that the garden stuff was growing how were you employed?

137 A. Part of the time on the place there clearing or burning or working the garden; part of the time in town at work at any job I could get to do—working for wages.

Q. Well, did you work in town more or less than you did out on the place during that time the garden was growing?

A. Well, that is difficult to say. I presume I worked about the same. I know I worked a day or two in town, and then went back on the place again, and so back and forth.

Q. When you would work in town did you always take your family with you to town?

A. If I had more than one day's work I did. If I stayed over night in town, then my wife would go to town. We had but one child, a small infant, and she wouldn't stay out there in the woods, and she objected to going there at all; said that she didn't want to; that it was lonesome and all that.

Q. Well, when you had work in town and knew that you were going to have work again in a day or two afterwards how was it then?

A. Sometimes we would go back to the place and stay over night and go back to town in the morning. I have done that repeatedly; go out and stay all night and go back into town and go to work. I should judge a couple of miles.

Q. Did you sometimes when you had work in town and knew that you were going to have work again a day or two afterwards—did you sometimes leave your family in town and go out yourself for that time?

A. Sometimes; yes.

138 Q. Who, if any one, visited or saw that garden at any time while it was growing besides your family?

A. Well, do you want me to name any one that I can remember that was there?

Q. Yes, sir.

A. My brother was there.

Q. Give the name, please.

A. Howard Carr. Several times my father, Job Carr, was there—a number of times. William Mahon was there; he hauled for me.

Q. I am speaking of the time when the garden was growing.

A. I don't remember whether Mahon was there while the garden was there or not; narrow it down to that; I can't say. A small matter like that, it is hard to remember—it is so long ago—who all were there. I might have thought they were there when the garden was growing, and I might be mistaken. I know one man that was there; the sheriff came there to do some business; came there to subpœna me to come here as a juror, and he came down in the garden and made remarks about the garden.

Q. What was his name?

A. Divison.

Q. D. W. C. Davison?

A. Yes, sir.

Q. He is dead, is he not?

A. He is dead. I remember that circumstance because I was at work in the garden, and lots might have been there I don't

139 recall just now; never thought of this matter before. Maybe I could think of more people that was there if I had time.

Q. You knew, then, did you not, that you would at some time be required to prove the improvements and cultivation that you had made there, did you not?

A. I expected to prove occupation of the land.

Q. Did you never take any one there to see what your improvements and cultivation consisted of?

A. Not with the object of making them a witness; I did not.

Mr. CARROLL: I suppose, Mr. Stiles, you are confining him now to these two years you first asked him concerning?

Mr. STILES: Of course.

Ques. What distance did you make that road?

A. How long was the road, do you mean?

Q. Yes.

A. The road was about three-quarters of a mile long—a little more than across two 40's.

Q. From what other road, if any, did it start?

A. From what was then the county road from Tacoma to the prairie.

Q. From what point on this tract to what other point did it run?

A. Well, if I had a map I could show you to within a few yards where it led. It went across part of Davison's claim, part of Peter Mason's claim.

Q. And on your own land, where did it run?

140 A. Well, the house was near the line.

Q. It ran to the house, did it?

A. Yes. You could drive around the house with a buggy. A man did do it—H. I. Chapman—and another man, I forget who, was with him.

Q. How much lumber did you haul in there with which to build your house?

A. About three thousand feet.

Q. From whom did you obtain that lumber?

A. I bought about twelve hundred feet of D. W. C. Davison, the ballance from the Tacoma mill—no; I didn't buy all from the Tacoma mill. They used to throw away a great deal of lumber, mind you, what they called cullings—threw it overboard, and I picked up a good deal of that and that I packed out. It was good lumber.

Q. Did you include that in the 3,000 feet?

A. Yes, sir. Some I hauled from the mill company, some from Davison's, and some was picked-up lumber—no slabs and trask, but good lumber.

Q. Was not the lumber that you bought from Davison lumber that had been used by him in a house on his claim?

A. It was.

Q. How many feet did you say you bought from Davison?

A. I think it was about 1,200 feet. That was what I bought of him and paid him for.

Q. Was that lumber in boards?

A. Yes, sir; part boards and part dimensions stuff. The

141 foundation was 8 x 8 dimensions stuff.

Q. Did you erect a house the same size that Davison's house was?

A. No; it was bigger. I used the foundation pieces that Davison

had used spliced out, because I made a bigger house—same width, but longer, you understand.

Q. Was not the house that Davison sold you the house that had been used on his claim as a claim-shanty or claim-house?

A. I think so.

Q. How large a house was yours?

A. It was 18 x 24, 10-foot walls.

Q. You mean 10 feet in h-ight*h*?

A. In h-ight*h*; yes—from the floor to the ceiling—with a lean-to kitch*i*n 10 x 16 that didn't run the full length of the width of the house—lacked two feet of it, because I used these sills that he had and they was only 16 feet.

Q. How many rooms had your house in it?

A. Three.

Q. Two in the main part—in the 18 x 24?

A. Yes, sir.

Q. And the lean-to kitch*i*n?

A. The lean-to kitch*i*n.

Q. When was your house commenced?

A. As soon as I got the road so I could haul in. Well, it
142 was in the fall of 1871. I can't give you the exact time now. I don't recollect when I got the lumber in there so I could go to building the house.

Q. In the fall of 1871?

A. Yes; the same year I notified. In the meantime I had built this log house, but I didn't like the location, and put the lumber house in another place.

Q. How long was it after you commenced the lumber house until it was finished so that you with your family stopped there?

A. Well, I suppose it was near three months, for I done every stroke of the work myself, same as I have three or four other houses. I built the one I live in now.

Q. The log house was never finished, was it?

A. It was owing to what you call finished; had a floor in it; had a roof on it; had a door, and I cut the place for the window and carried the window there, but it wasn't put in place. It was what we called "chinked," but hadn't been "daubed"—"muddied," you know. It was a house fit to live in, but, strictly speaking, wasn't finished—that is, the log house, I mean.

Q. You never occupied the log house?

A. No; only just temporarily; I carried boards in there on my back and carried them out again; three or four hundred yards, maybe.

Q. What became of the log house?

A. It was burned up by wood fires; fires got to running in the woods and burned it.

143 Q. You didn't tear it down?

A. Oh, no; it burned with a pile of lumber that laid right alongside of it—that is, a couple of hundred feet or so. It burned just the way ot was.

Q. Do you remember testifying before the register and receiver

of the land office in 1873 in the contest between yourself and Robert Sproule?

A. Yes; I remember the contest.

Q. Did you not then state in response to the question addressed to you, "What became of the cabin you built there?" (meaning the log cabin), "I tore it down in order to put a plank house in place of it"?

A. I started a foundation for a log cabin where the plank house stands——

Q. The question calls for a direct answer, Mr. Carr.

A. I don't know whether I did or not. The records will show.

Mr. CARROLL: Now, you may give any explanation you wish.

Ans. I started a foundation for a log house where the plank house stands and, after I had got it one or two logs high, found I could buy Davison's house of him and tore that foundation away. That is the mountain and that is the mole hill in that business. The cabin I put the floor in and the roof on burned down. I started another cabin very near, where I dug a well and got water. Where I had the first cabin there was no water.

144 Q. Did you in the course of your testimony before the register and receiver say anything whatever about your having built another log cabin?

A. I don't remember; couldn't tell you now.

Q. Describe that plank house minutely as it existed Juny 6th, 1873.

A. It was built with 8 x 8, maybe 6 x 8; I wouldn't swear as to the inches of the foundations; they were dimensions stuff; it was 16 x 24 feet long, built of inch lumber; the walls and the rafters were 2 x 4 scantling; inch-board sheet-ing, shaved-shingle roof; good tight floor and battered door; windows, two twelve-light windows, and one was 10 x 12 lights and the other was 10 x 16 lights; the door was near the centre of the north or front side of the house; one window was in the west end and one window was in the south side; one partition across where I had a bed; there was a fire-place in the east and that was of brick and stone, mostly stone; some brick I carried in on my back for the hearth, you know, and like of that; then it was stoned up, fire-front, and a stick chimney. I couldn't get bricks hauled from Steilacoom; there was a road, but I couldn't get them hauled, and there was no bricks at Tacoma then. I couldn't get brick hauled, so I carried them in on my back.

Q. What was the partition made of?

A. Lumber—inch boards.

Q. You have not described the lean-to yet.

145 A. The lean-to was built of inch lumber with 2 x 4 scantlings, rafters; inch sheet-ing, shaved shingles, board floor.

Q. How high was the outside wall of the lean-to?

A. 8 feet.

Q. How were the boards put on the outside of the building?

A. Lengthwise, up and down, nailed to a plate; *sail* below and plate above, battened.

Q. When was the bannening put on?

A. The mattens were not put on when it was first built; not for some considerable time afterwards, and how long it was I don't know.

Q. Were not the battens put on after Sprouls filed his notice of contest?

A. Well, I couldn't tell you about that. I went right on with my improvements and residence there, just as though no contest had taken place. I wouldn't say that they were or were not. I don't remember.

Q. What, if any, portion of that tract of land, that 160 acres, was their upon which you could reasonably expect to raise a fair agricultural crop if it was cleared off?

A. In the condition it was in——

Q. If it was cleared off, I say.

A. Well, a very small part of it, perhaps. Oh, a piece of that swale, maybe there was; it is hard to give a good guess now; well, 4 or 5 acres. There was but little of it, very little of it.

Q. Was it not all covered with heavy timber?

146 A. It was; and a thick undergrowth of brush, both.

Q. About how many thousand feet of lumber would that timber cut to the acre?

A. Well, sir, I am not a logger nor a very good judge, but I suppose it would cut—it was good timber, and would cut—I am afraid to say; I am not a good judge—fifty or sixty thousand; it was heavy timber.

Q. 50 or 60,000 feet to the acre you mean?

A. Yes, sir. There was other timber; maybe a logger would call it saw timber. There was more than that of heavy timber, but how much was saw timber I couldn't tell you.

Q. At the time you had the most there at this house what conveniences had you there for living?

A. A stove with the necessary utensils, table, sufficient kitchenware, dishes, pans, a good bed, plenty of bedding, two chairs, a rocker and another chair, and other conveniences that I cannot recall just now.

Q. In your testimony given in chief you give the value of your improvements on this land as from $800 to $1,000. Please state in detail the items which in your mind go to make up that and the value of each.

A. Well, I wouldn't cut another half mile of road like that was for $100 and take the logs out or grade it. There was 900 feet hauled over it at one load with one team. Although it wasn't all on the land it is my idea it was improvements, and that I ought to be allowed for them, and I carried from the county road

147 mentioned, this half mile—carried 500 feet, perhaps, of lumber and material on my back in there. That is very strong in my mind. I hav-n't forgotten it. I have done a great deal of chopping, lifting, rolling logs, and burning and very hard work that after it is done leaves very little show; any man that ever cleared timber land knows that. That is all in my mind yet.

Q. Add the values of each.

A. This value of labor that I done with my own hands aggregates more than $800 worth, which, having done it once, I wouldn't do it again for $800.

Q. What was lumber worth a thousand feet at that time in Tacoma?

A. Rough lumber was according to quality——

Q. Such as used in that house.

A. That was $15 lumber; that is what I paid for what I bought.

Q. Did you pay Davison that much for what you bought of him?

A. I paid Davison $22 and some work; about six days' work on his house out on the prairie. I went there and worked for him and paid him $22 for his house, and moved it myself without any help.

Q. Did you not testify before the register and receiver in your contest with Sproule that the improvements you had made up to June 6th, 1873, including the log house, the lumber house, the road, and all your labor in clearing, did not amount to $375?

148 A. I don't think I did. If they wrote that down they didn't understand my statement; no, sir; I didn't say that. I don't know what they have written down; I know better than to make such a statement as that.

Q. Do you say you did not so state?

A. No, sir; not if I understood their question I didn't. If they have got it written so they either didn't understand me or didn't write what I said.

Q. After you moved your bedding, stoves, utensils, etc., into your lumber house up to what time did they remain there?

A. I couldn't answer that question; I never removed them to this day.

Q. What became of them?

A. That is more than I know; I left them there; they were my possessions and my house and I left them there.

Q. When did you last see them there?

A. A few of the things were there—one chair and the table was there—well, it was in 1874—in the fall of 1874—that a few of the things were there; the tools had disappeared, the windows had been taken out of the house, were gone, and the partition was all taken away entirely, and the floor out of the kitchin part, and part of the ceiling torn down from overhead in the main building.

Q. Were those family effects—the stove, the kitchinware, bedding, etc.—there in June and July, 1873?

A. I can't tell you that.

Q. About the time of the contest with Sproule?

149 A. Oh, just at that time they were; that was July, '73. Oh, yes; they were then and after that; but things were taken——

Q. How long before that had they been placed there?

A. Oh, I judge at different times; I took the stove out there on a wheelbarrow in May.

Q. Of what year?

A. 1873; because I was married the 20th of May, and that anniversary, the 20th of May, 1873, I took a stove out on a wheelbarrow; I remember that, because my wife went along, and we remarked, just before we got there, that that was the day that we were married on.

Q. Was that the first thing you took there?

A. Oh, no; I carried small things there before that; the bed had been there, some dishes, and a pot that I cooked with out at the fire-place.

Q. Before the 20th of May, 1873, you had done your cooking without a stove?

A. Yes, sir; with a fire-place—pots and pans in a fire-place. Shortly after the contest the stove was taken away.

Q. How came the stove to be taken away?

A. Well, that is more than I can tell you now; I can't give a plausable reason.

Q. Did it disappear without your knowledge?

A. Altogether so; gone before I knew it.

Q. Did you stop your residence there at that time?

A. No.

150 Q. Were you temporarily absent when it disappeared?

A. Yes, sir.

Q. How long were you absent at that time?

A. At the first time I missed the articles from the house I had a job of work that kept me about three weeks, or possibly four, and in order to get the job I had to finish it, and a four weeks' job was a pretty fat thing for me then.

Q. Where was the job?

A. In Tacoma.

Q. What doing?

A. Painting and papering; that is my business.

Q. During that time you did not visit your homestead?

A. No, sir.

Q. Where were your family at that time?

A. In town.

Q. At your house in Tacoma?

A. Yes.

Q. You lived there with them?

A. Yes, sir.

Q. That was when the things were taken in 1874, in the fall some time?

A. Yes; in the fall some time, in the latter part of the year. I didn't know whether it was in November or December.

Q. Was your house broken open?

A. Oh, yes.

Q. What signs of its having been broken open did you see there?

151 A. Well, the door was fastened; a hole was bored, an inch hole, bored an inch hole through an inch wall, and then a hole opposite through this battened door, a cedar door it was, and then passed a chain through and fastened the two ends with a pad-

lock, and a stick had been forced in there and this intervening inch and a half or so had been torn out; that was the way it was broken open.

Q. The first time you missed anything, what did you miss at the time you found the house broken open?

A. There was some things taken before that; some small things; maybe dishes; a porcelain kettle was taken.

Q. When you went back there after the house had been broken open in the manner you describe, what then did you miss from the place?

A. Two pair of good blankets was gone and one pillow; one was left there. I don't remember now all the articles that I missed then at that time.

Q. Well, did you afterwards supply the things that had been taken away?

A. Partially, enough that I could get along with.

Q. How long did you continue your residence there after that time?

A. Oh, at intervals for a year or nearly that.

Q. That would bring it into 1874?

A. Yes.

Q. Then where did you live after that?

A. In Tacoma mostly.

152 Q. In your testimony you say that you proved up on this land. Do you mean to be understood as saying that you proved up or that you merely went to Olympia and attempted to do it?

A. No; I never said I proved up; I said I tried to prove up.

Q. In response to questions of your counsel have you stated all that you did in attempting to prove up?

A. Maybe I stated all the principal causes and maybe I omitted some. A man isn't expected to remember everything at one time.

Q. In response to this question, "You may state whether *t*ou ever proved up or attempted to prove up at the United States land office at Olympia on that land," did you make the following answer: "I did. Took witnesses to the land office at Olympia; went before the register and told him I came to prove up on my homestead or to make such statements as necessary, and he refused to entertain me at all; wouldn't even talk to me respectably about it; was snappish and short; wasn't inclined to listen to me; in fact told me he was busy and didn't want to be *p*othered. I didn't see what I could do any further"?

A. That is right.

Q. I now ask you whether you did anything else towards proving up on that land than what you have stated in your answer to counsel.

A. Well, I don't understand that question exactly. I don't know how much ground it covers.

153 Q. You say, "I took witnesses before the register and told him I came to prove up on my homestead or to make such statements as necessary." Did you do anything else?

A. Well, I don't recall to mind now anything important that I did. Possibly I might.

Q. You say in response to counsel to this question, "You may state whether or not you claimed credit then to the register or receiver or either of them for your term of service in the Army of the United States," "Yes, sir; I certainly did. I understood I was to be allowed my term of service in the army on the land and asked to be allowed that time." That was May, 1878.

A. Yes; that is right.

Q. Now, did you at that time wish to have the three years of your service allowed as going to make up your time of five years' residence?

A. Yes; I did. I wanted the three years' allowance. I understood that was law.

Q. Why was it that you desired such credit if it was a fact that as you have testified in your testimony that you had actually been living on the land from May 21, 1871, to 1878?

A. Because I understood it was the law of the land, and the three years would help me out.

Q. You claimed to have been living on the land seven years, did you not?

A. No; I claimed I was in possession of it; claim it yet;
154 have been all the time; never lived there seven years and never said so. I claim possession of the land.

Q. Was it your claim, then, to the register and receiver that having lived upon this land for three years, beginning June 28th, 1871, running to June 28th, 1874, that in 1878 you were entitled to go into the land office and claim and have allowed you four years' service in the army as equivalent to actual settlement?

A. I claimed before the register and receiver then to be allowed three years' service because I had lost my discharge from my one year's service, couldn't then produce it, and I lived there two years and that would make the five years, and I have since recovered my one year's discharge, and now have them both, and I claim three years' allowance and two years' actual residence. My year's discharge then was *was* lost. I have found it now long ago.

Q. How long a residence did you say you claimed?

A. Two years. I lived more than two years, but I claimed two years.

Q. How much more than two years did you live there?

A. Oh, probably two years and a half that I made that my home.

Q. In all?

A. Yes, sir.

Q. Were not Messrs. J. B. and J. S. Allen your counsel in your contest in the land office with Sproule?

A. They were.

Q. Did you show the notice of the register and receiver,
155 which you say you received some weeks after your contest with Sproule, to your counsel, Messrs. J. B. and J. S. Allen?

A. To one of them.

Q. Which one?

A. I don't know which is J. B. and which is J. S.; the largest one I showed it to.

Q. You showed it to one of them?

A. Yes, sir.

Q. Please state the entire contents of the notice you received from the register and receiver as near as you can recollect.

A. It was dated at the land office in Olympia, and the date I cannot give you. "In the matter (I cannot give you the exact heading) Sproule *vs.* Carr we find claimant failed to prove abandonment." Those were the exact words, precise words, and signed "Brown, register (I forget his first name), and Stewart, receiver (I forget his first name)." I think it was a printed heading; I think it was a printed letter-head. I won't be positive about that; not positive, but I am positive about the contents of it.

Q. Is that all the notice contained?

A. Oh, there was something of an ending. "Very respectfully, your obedient servant," or something; I don't remember that wording.

Q. With that addition, was that all?

A. That is all I recollect about, sir.

Q. Are you positive that is all?

156 A. No. I am not positive that is all, but I am positive that was all the finding.

Q. Are you positive that was all the substance of the notice?

A. No; there might have been a word or two more, but I am positive that is all of the finding. There might have been something else that didn't bear so strongly on the subject—that didn't make so much of an impression on my mind as that did.

Q. Did you not prosecute an appeal from the decision of the register and receiver, through your counsel, Messrs. J. B. and J. S. Allen, to the Commissioner of the General Land Office?

A. Messrs. Allen made some further move; made what they called an effort for some time—I don't remember how long—without any authority from me and positively without my knowledge and, so far as I was concerned, without my consent, because they didn't conduct the defense of the case to suit my ideas. I didn't employ them to go any further than just there in the land office, and neither did I pay them for anything further than that. I paid them for that and got their receipt, and that is all I paid them for. They did make a move further after that; what it was I don't know, only by hearsay, nor neither did I authorize them to make any move.

Q. From what source did that information come concerning their going further for you?

157 A. Hearsay, public talk, public comment; one and another would tell me this, that, and the other.

Q. Others told you that they were prosecuting the case still further?

A. Yes, sir.

Q. Did you ever notify them that you did not desire them to prosecute it any further?

A. I saw one of the Mr. Allens on the steamer and told him to let the matter rest; let it be where it was; they were not the attorneys I choose to make any further move in it. What they did after the trial before the register and receiver they done without my knowledge.

Q. You knew that the case was pending, did you not, before the Commissioner of the General Land Office?

A. No, sir; not for months. I thought the case was settled when I got that notice from the register and receiver of their finding. That was my firm belief from the finding, and I had no reason to think any otherwise.

Q. How many months was it afterwards?

A. Oh, I can't tell you now; the time that intervened is past my memory now; I can't tell you.

Q. Did you not, after the decision of the register and receiver of the Olympia land office and on the 12th day of August, 1873, write or send a communication to the Commissioner of the General Land Office, signed by yourself and sworn to before George E. Atkinson, a justice of the peace, at Tacoma, in the following words:

TACOMA, WASHINGTON TERRITORY, *August 12th*, '73.

158 Hon. Willis Drummond, Commissioner General Land Office, Washington city, D. C.

SIR: I wrote you at some length the 14th of June concerning the seizure of a few thousand feet of logs I had cut on my homestead, entry No. 1368, Olympia land district, and received a reply from the General Land Office, marked "C, vol. 124, p. 184," and for the notice and reply I am very thankful and I shall crave your indulgence for just this one more intrusion on your time and attention in reference to my homestead and not the timber referred to before. Certain parties, whose names and doing- will appear, have, in pure malice and with personal spite, induced a low and irresponsible wretch to contest my claim on the ground of abandonment. The testimony of the trial held before the register and receiver in Olympia, July 17, 18, and 19th, you doubtless have in your office before this reaches you. It is to ventilate some of these *rpoceedings* of that trial and to claim my own that I am writing to you. To begin with, the agents of the Northern Pacific Railroad Company here, through their subs and menials, openly claim and boast that they own and control the surveyor general, the register, and receiver in Olympia, and that no one can get anything through that official fountain except such as the N. P. R. R. choose to let the people have. For information on that point I refer you to any good business man, who is not a railroad man, in Olympia or
159 Seattle, or, for that matter, in the Territory. Then, again, it is positively sure and a conviction that the railroad managers and land ring, I refer more particularly to Judge Rice, J. C. Ainsworth, J. W. Sprague, E. S. Smith, and their more immediate associates here, have put up this job to rob me of my homestead, whether or not right or wrong; and right here I wish you to notice particularly, if you please, that fact that I state unser oath, and I

can prove that one of their confidants boasted to me a day or two before the trial that these men (Sprague, Smith & Co.) had counted the cost and chances before they went after my claim, and that they meant to have it at any cost or rate, and *and* he offered to bet me $50 that (mark the language) they would beat me out of the land, not a damned bit of difference what I proved, they were so sure of the result, for, he continued, they have millions of money and you have not a cussed dollar. This is only a small part of the conversation, but will give you an idea of the operations.

As to the men or tools they employed, the contestant, Sproule, I have been told, was a Missouri bushwhacker, is a railroad employee under Sprague, and *pur*jured himself in the sworn testimony which you have or ought to have of the trial. He swore in his complaint that he knew me and the land for six months previously to June 6th, &c., and in his evidence swore he had been in this county only
6 days previous to the 6th of June. H. N. Steele, the princi-
160 pal witness in the prosecution, is a violent, rabid secessionist and a very quarrelsome man. He went to Caribou early in the late war, took the oath of allegiance to the British government, and thanked God that he was away from the damned Yankees, Abolition rag, and a string of such stuff. He is the same man who was the main cause and witness in my father's homestead contest (which was not forfeited) a couple of years ago, swore all about the claim at great length, and on cross-examination got confused, broke down, and sa*id*, "I don't know a damned thing about the claim." My father, brother, and myself, having been Union soldiers, are especially objects for his malice and hatred. Hentzleman, another of Sproule's witnesses, is a low, ignorant foreigner and a violent secessionist, and who, early in the rebellion, went to Fort Steilacoom and was advising the soldiers to secede or revolt and talking secession generally, and was arrested and confined in the guard-house three or four weeks by the officers in charge for his talk. He now owes me money for work I done for him, and will not pay me. Chapman, another of Sproule's witnesses, is a notoriously violent secessionist and a bitter enemy of mine on general princip*als*, politic*l* particularly, and is a man who would do another a private injury, as he sought to do me in this case. Now, as to my attention to the claim: I have done more work and built a better house on the claim and have stai*e*d closer by it than any other claim in this region, with one exception only, and I state most positively,
161 under oath, that I have not abandoned the claim and that I have not forfeited it, and that the longest period of time I have ever been absent or ceased to work on the claim was fourteen days, and that only once since I filed my notification on the same. I am a poor man and labor for my living. The land in question being heavy timber and very dense brush undergrowth, I could not make a livelihood on the same before a vast amount of labor had been expended, and so I must do the best I can until I can prove up on it and sell the timber and clean a space of sufficient size to enable me to live. I served nearly four years in the army as a volunteer, was twice wounded, and incurred what is vastly worse, ex-

ternal hemorr-oids, brought on by exposure and excessive hardships while a soldier. I have been offered a certificate of disability by U. S. inspecting surgeons, but don't want it. All I ask is a show to look out for myself. One point I notice in the circular received from the General Land Office, which says the contestant in such cases must pay the expenses of the suit, which was not the case with me. I paid my own attorney, as I expected to, and the register and receiver made me pay half the expenses of the suit—some seventy-five dollars. But I — trespassing on your time and patience, I fear. I have not the means to make a long or short, legal or formal, defense of my rights in this case, and can only claim my own and must abide your decision.

162 I refer you for any inquiries concerning myself which you might make or wish to make to the following gentlemen, who knew me more or less intimately. I might name many others, but probably these are sufficient: Hon. John P. C. Shanks, M. C. from Indiana; Hon. G. W. Julien, M. C., Ind.; General S. Meredith, of Ind.; Hon. D. P. Holloway, of Indiana; J. M. Blanchard, U. S. Patent Office; Col. Wm. W. Dudley, Richmond, Indiana; Hon. E. P. Ferry, governor of Washington Territory; Hon. S. Garfield, ex-M. C. and collector of customs, Washington Territory (Mr. Garfield knows the man Steele if you wish to hear any more of him); Hon. P. D. Moore, deputy collector, Puget Sound district; Hon. Elwood Evans, U. S. Centennial commissioner for this Territory; A. J. Burr, P. M., Olympia; Geo. W. Barnes, Banker, Olympia; N. Crosby, of Wells, Fargo & Co., Olympia, and any respectable man anywhere that knows me.

With many thanks for a patient hearing of the case, I am, sir,
Yours truly, A. P. CARR.

This is to certify that Anthony P. Carr, of Tacoma, Wash. Ter., appeared before — and maketh oath that the within contained is true to the best of his knowledge and belief.

Sworn before me, the undersigned, a justice of the peace in and for county of Pierce, Territory of Washington, this 12th day of August, 1873.

GEORGE E. ATKINSON, *J. P.*

Did you write and forward that letter to the Commissioner?

A. I think I did. I stand by it.

Q. Now, Mr. Carr, when, in the course of this communication to the Commissioner, you said you used theso words, "And
163 must abide by your decision," did you not know and understand that that case was before the Commissioner of the General Land Office for decision?

A. Only by hearsay.

Q. You knew it in that manner, did you not?

A. I heard it was, and of the impulse of the moment I wrote that. I heard that it was there. I supposed it had been settled. I heard that by some means it had been brought before the Commissioner. I didn't know how. I had no money to employ an attorney and so I wrote that letter.

Q. Did you not know that the only method by which this case could come up before the General Land Office was by appeal from the decision of the register and receiver?

A. No; I didn't know anything of the kind. How did I know by what hocus-pocus that may have been brought up there. I am not a lawyer. Mr. Carroll would know, probably. I wouldn't. You would know, these gentlemen here might know, but I wouldn't.

Q. After the decision of the Commissioner of the General Land Office, and on the 5th of July, 1884 (7), did you not prosecute an appeal to the Secretary of the Interior, through your counsel, Messrs. J. B. & J. S. Allen?

A. No, sir.

Q. Did you not know at the time that appeal was pending that it was pending before the Secretary of the Interior?

A. I don't know what you call pending. I heard it after
164 it had been going on some length of time, not from the first.

Q. You had heard of it, had you not, as being before the Commissioner of the General Land Office when you wrote this letter?

A. Just then I had. That was the first I heard of it.

Q. And that was on the 12th day of August, 1873, was it not?

A. Well, the date of that letter—I can't tell you when I wrote.

Q. A little over two weeks after the trial at Olympia?

A. You mean a year and two weeks.

Q. No; I mean two weeks.

A. I din't know anything about the date. You can refer to the document. I can't tell you now.

Mr. STILES: I think that is all.

Adjourned to 2 p. m. April 21st, 1888.

165 TACOMA, W. T., *April* 21, 1888—2 p. m.

Plaintiff present and represented by his counsel, Mr. John Arthur; defendants represented by their counsel, Messrs. T. C. Sears and T. L. Stiles.

Mr. STILES: I would like to ask you a few more questions, Mr. Carr.

A. P. CARR, plaintiff, recalled for further cross-examination by Mr. STILES:

Question. Mr. Carr, did you not state, in response to questions of your counsel in the contest before the register and receiver in your contest with Sproule, that your first improvements on this land were clearing the ground, cutting logs, rolling, cutting, and piling brush, and burning near the southeast corner of the claim?

A. I don't recollect now if I did or not. I couldn't be particular as to that now.

Q. Did you not say in response to the question, "State how many days you worked at that improvement," "I can't give exact num-

ber of days; perhaps two weeks. I worked there over a week, I am certain, at that time"?

A. Well, I could not dispute that I made such an answer. I don't remember now positively as to that.

Q. In response to the question if anybody worked with you at that time; if so, who and how long, did you not answer, "There did. My father worked with me some three or four days. I don't recollect just the number of days. He worked there three days, and I think four or five"?

166 A. Possibly I made such an answer as that.

Q. In answer to the question, "State whether you made any other improvements." "I did. I began and partly built a small cabin, and afterwards tore it down and concluded to build a plank house, because a cabin was so dirty. I also cut a road, but never finished that piece—cut it about one hundred yards. I worked on the cabin about a week, about two weeks on the cabin and road together."

A. That may have been the case; I din't remember.

Q. You don't remember whether you so stated or not?

A. No; I couldn't say now.

Q. In response to the question, "State whether you had your family with you in the cabin and how often and how long," did you not answer, "I had my wife there; don't think she stayed there but once or twice, at that particular place. I changed my mind about that location and left it entirely; went to another place on the same claim"?

A. That might be so.

Q. In response to the further question, "State whether you made any other improvements at that spot," did you not answer, "I set out some fruit trees, from 20 to 30 small trees; couldn't have been less than 25, might have been 35"?

A. That is probably correct.

Q. In response to the question, "State, if you know, what the value (C. E. resumed, Carr, A. P.) of the improvements you

167 made at that place at that time were," did you not answer, "My own work was worth $20; my father's work was worth something like $8 or $10; the trees could not be got short of twenty cents apiece"?

A. Yes; I think I paid 20 cents for them, or 25.

Q. Did you so answer?

A. It is possible I did; I don't remember now. I can't tell you.

Q. In response to the question, "State whether you continued to work there or if you abandoned that spot; and, if so, for what reason," did you not answer, "I abandoned that spot because I had a large hill to go up and down getting to and from it"?

A. Possibly I did.

Q. In response to the question, "What became of the cabin you built there?" did you not answer, "I tore it down in order to put a plank house in place of it"?

A. I don't remember whether I made such an answer or not.

Q. In response to the question, "State where you made your next

improvements on the premises," did you not answer, "Nearer the northwest corner of the claim"?

A. Yes; that is about right.

Q. In response to the question, "State what that improvement was," did you not answer, "Clearing, cutting, and burning timber and brush"?

A. Probably I did.

Q. In response to the question, "What time?" did you not answer, "At no particular specified times, at intervals—every few days. I could not make a living on the claim; it was all heavy timber and heavy undergrowth both"?

168 A. Yes; probably I made such a question.

Q. In response to the question, "About where in the claim was this? Locate it as near as you can," did you not answer, "Without having measured from the outside lines I think it was in the northwest quarter of the claim"?

A. Well, that is approximately right; maybe I made such an answer.

Q. In response to the question, "State how often you have worked at that clearing—how many days," did you not answer, "I have worked there more than a hundred different days; couldn't tell how many"?

A. Well, that question is loke the others. There was so many asked me—the trial was a long one—that I can't answer now from memory whether I made those exact words or not.

Q. Did you say so in substance?

A. I might have said so. I can't say now whether I made such answers in substance or not.

Q. Did you not, in answer to the question, "On how many different days in the six months prior to last June?" state as follows: "I think not less than on 20 different days"?

A. Well, that was the June referred to in the contest.

Q. Previous to the contest?

A. Well, I might have said so.

Q. In response to the question, "How much is the improvements on the second clearing worth?" did you not say, "Well, if

169 I had hired Indians to do the work I did it would have cost me a hundred dollars, for all I know"?

A. I might have made such an answer as that.

Q. In response to the question, "How much do you consider it worth to the claim?" did you not answer, "Not a very great deal"?

A. Couldn't tell whether I made such an answer as that now.

Q. In response to the question, "State if you made any other improvements about there, as planting trees, sowing sees," did you not answer, "I sowed one peck of timothy seed on the ground. It probably covered four or five acres; don't think it could have been less than three acres. It might have been five"?

A. I might have.

Q. In response to the question as to how much work you did in

clearing out the road, what it was worth, did you not answer, "My impression would be it would be, it could be, worth $25"?

A. I don't remember now whether I so stated or not.

Q. In response to the question, "State what other improvements, if any, you made on this claim," did you not say, "I hauled lumber—had it hauled—put up a house. I did not measure the lumber; should think it was in the neighborhood of 4,000 feet. I didn't measure it"?

A. Possibly I so stated. I din't recollect.

170 Q. In response to the question, "State what was done with the lumber," did you not answer, "I built a house with part of it; didn't use it all; have not yet; it lies there yet; I intended to use it and shall to put on an addition"?

A. I moght have so stated.

Q. In response to the question, "State where you got it and what it cost," did you not answer, "I got it from the Tacoma mill; it cost me 12 dollars and a half; has cost on the place 16 or 18 dollars"?

A. Lumber I got from the mill might have cost me that, probably did, and I might have so stated; don'e remember now.

Q. In response to the question, "What did the lumber in your house cost?" did you not answer, "$20 besides the hauling, exception of a pile that lies in the house; the hauling cost five or six dollars"?

A. Well, I might have stated something like that; in substance that; I don't remember.

Q. In response to the question, "How much work did you do on the house?" did you not answer, "That's difficult to tell. I worked at it at odd jobs on different days; not less than 20 perhaps; not 20 days, but at 20 different days; perhaps it would take me alone 10 full days' work"?

A. At that time, up to that time?

Q. Up to that time; certainly.

A. Well, I might have so stated.

Q. In response to the question, "Did any one assist you; if so, who and how long?" did you not answer, "My father as-

171 sisted me on three or four parts of days, or five; my father-in-law assisted me also"?

A. Possibly I so stated.

Q. In response to the direction to describe the house, did you not state, "The house is a good, substantial plank house; I think it is 14 x 18 feet as it now stands without the addition; it is a house I tore down, bought, and moved there; it was a good, tight floor, well laid and smooth, of inch lumber; has a good roof and shaved shingles, not shakes or clap-boards; a good roof. well put on; I made the shingles, all but a few of them; I made the most of them; I have made 200,000 feet up there in the woods"?

A. Well, it is like the rest of them—out of my memory now, so that I cannot neither say whether I did or did not say so to that particular question and——

Q. Did you not further say, in describing the house, "The house as present has one door and one window, both good and properly

put in; the door is of dressed lumber and jointed; the window is a 12-light number 13, in good condition, a new one; the window cost $3.50 in Seattle; the house is a good, comfortable house to live in"?

A. I don't remember now; maybe at the time of the contest I had but one window in and I might have so stated.

Q. In response to the direction to state if the house was battened, did you not say, "It is all round"?

A. That I don't remember—when I battened it.

172 Q. In response to the question, "When were the battens put on?" did you not state, "Recently; I can't tell just when; when the house was put up it was of green lumber and mouse-tight—so tight a mouse couldn't get in; since then the storms have opened the cracks and now it is battened"?

A. Maybe I stated so.

Q. In response to the question, "State whether the house has been battened since the contest began," did you not answer, "It has; I worked there occasionally, just the same as though it hadn't taken place"?

A. Well, I don't remember. I might have said so or not.

Q. In response to the question, "What is the house worth?" did you not answer, "To me, under the circumstances in which I got it, I should think it was worth to me $75 or $100"?

A. Well, I don't know about that. Probably the house was worth that to me; maybe I so stated.

Q. In response to the question, "State whether there was a chimney about the house, and describe it, on the 6th of June," did you not answer, "There was not a finished chimney; there was a stone fireplace, faced stone—a good, substantial fireplace"?

A. Well, that I don't remember, whether I said so or not.

Q. In response to the question as to what was the value of the materials in the chimney, did you not say, "Stone, selected stone, was worth the trouble of gathering it up—a day's labor—three or four or five dollars"?

A. I couldn't tell you.

173 Q. In response to the question, "State whether or not you had any beds in the house," did you not state, "Not a mattress; I had blankets, quilts, and pillows"?

A. Well, I first took a straw bed, and afterwards I took the burrow bed there. When I took the burrow bed, with respect to this contest, I don't remember.

Q. Did you not state, in response to the question, "Prior to June 6th did you sleep in the house there, and how often during the six months prior to June 6th"? "I did. I can only give an approximate answer; 15 to 25 times; probably not more than 25 and not less than 15"?

A. I can't recollect whether I made such a statement or not.

Q. Did you not state, in response to the question, "State what you had there to sleep on," "Blankets and quilts; two paid of double blankets and one single blanket—new blankets; one quilt and one comfortable; two feather pillows, good one-"?

A. Maybe I used such words; I don't remember.

Q. In response to the question, "State up to what time prior to June 6th you left them there," did you not answer, "I can't say exactly; not far from the first of May. Some one went into the house and packed them off, stole them"?

A. Don't remember about that either—that is, about saying so.

Q. In response to the question, "State what else you had in the house prior to the 6th of June," did you not answer, "I had a cross-cut saw and a hand-saw, carpenter's plane and a hatchet and *prowel*
and drawing-knife and ax; good maul, iron wedge, two
174 buckets, plate, knives and forks; stove, pot, frying-pan, and
a quantity of nails, sometimes would be a pound and sometimes ten; spade and a hoe, mattock, and lots of such rubbish"?

A. It may be I stated so.

Q. In response to the question, "State, if you kept them there, to what time," did you not answer, "Till the house was systemalically went through—robbed"?

A. Possibly.

Q. In response to the question, "State where you kept your things after that up to the 1st of June," did you not answer, "Some I left in my house, some I took to my house in town, and some were stolen"?

A. Well, I can't say now whether I said so or not.

Q. In response to the question, "State if in that six months (meaning the six months prior to the 6th of June, 1873) you have cooked out there and how often," did you not answer, "I have almost invariably made me a pot of coffee or tea when I would be at work there"?

A. Well, that is the case; probably I said so.

Q. In response to the question, "Did you make any other improvement than that you have mentioned about the house; and, if so, what"? did you not answer, "I did; I cut and burned down all the trees that I thought dangerous, that leaned that way and would be liable to fall on the house"?

A. Well, it is possible I made that answer.

Q. In response to the question, "State the number of trees you
cut and burned down there," did you not answer, "I don't
175 recollect exactly; eight to a dozen right in the vicinity of
the house"?

A. Well, neither do I remember exactly about that answer, the exact wording of it.

Q. In response to the question, "How much did you do within the six months prior to June 6th"? did you not answer, "From six to ten days; log and brush burning"?

A. Well, I have no recollection of confining my answer to so small an opinion as that.

Q. In response to the question, "Are you a strong man; can you do hard work, a great deal of it at a time"? did you not answer, "I am able to do light work; not able to do heavy work; am not strong; was wounded in the hip during the war and have not wholly got over that"?

A. That was the case. I might have said so.

Q. In response to the question, "Would you be able to make your living on that claim"? did you not answer, "No, sir; I could not"?

A. Well, if I confined myself to the claim alone for a livelihood.

Q. Did you so answer, is the question?

A. I might have said so. I don't remember now if I said so or not.

Q. In response to the question, "State whether you made any other improvements than those you have mentioned on the place," did you not answer, "I planted potatoes, an irregular
176 kind of a patch, four or five rods, perhaps; I didn't measure it; the ground was generally sandy and rocky and would not pay for cultivating it"?

A. I don't remember about that, making such a remark as that.

Q. In response to the question, "State how much time since you have taken up your claim and up to the 6th of June you have spent in photographing," did you not answer, "Sometimes I would work for two or three days and sometimes I would work for two or three weeks; that was my only available means of getting a living"?

A. Well, I don't remember that I made such a confined answer as that.

Q. In response to the question, "When did you tear the cabin down?" did you not answer, "Within three or four days of the time I began to build it"?

A. I don't remember now; that was the foundation of the cabin that stood exactly where the plank house was built that I tore down—tore away.

Q. In response to the question, "When did you sow the grass seed?" did you not answer, "Can't give the exact date; it was perhaps ten months or a year or fifteen months ago. I don't know whether the seed came up; don't recollect that I went there for the purpose of seeing if it came up; I passed through there and noticed it in places"?

A. Well, I don't remember now about such an answer as that, either way.

177 Q. In response to the question as to how much did the house that you speak of as having bought from Davison cost, did you not answer, "My impression is that I gave him $20 for it and tore it down myself"?

A. Well, that is pretty near the mark, and I might have so stated; I don't remember whether I said so or not.

Q. In response to the question, "When did you finish your house to a habitable state?" did you not answer, "I think I had it enclosed, roof on and floor down, about this time a year ago"?

A. I don't remember about that now.

Q. In response to the question, "When did you move your stove out of the house?" did you not state, "I took that out some time this last spring—since the last holidays; that's as near as I can get at it"?

A. That was a small box stove that I took out there first and re-

moved away, and the cook-stove I never removed, and I might have made that statement in regard to the box stove.

Q. In response to the question, "When was the last time you cooked in the house prior to the 6th of June?" did you not answer, "That must have been some time in February or March"?

A. No; I don't think I made such a statement.

Q. In response to the question, "Then you took the stove away in February on March?" did you not answer, "It might have been or it might have been as late as April"?

178 A. I might have taken the box stove away in March or as late as April; I took the cook-stove there the 20th day of May, the anniversary of the day I was married.

Q. In response to the question, "Where did you plant those potatoes?" did you not answer, "In the burn south of the house, or southwest, perhaps"?

A. I might have said so.

Q. In response to the question, "Have you ever dug them?" did you not answer. "No, sir"?

A. I never dug all of them; I don't think I said I never dug any of them.

Q. Did you sign the deposition that you made before the register and receiver?

A. Yes, sir; at least what they said it was.

Mr. STILES: That is all.

Redirect examination by Mr. ARTHUR:

Question: Mr. Carr, in your answer on cross-examination relative to Tacoma, its size and business, you say there were about 250 or 300 people there at that time and very little business outside of the Tacoma Mill Company's business. You may state whether at that time, to your knowledge, the Northern Pacific Railroad Company had agents here securing donations of land for that company upon condition of establishing the western terminus of its road at Tacoma?

Answer. Yes, sir; they had during that time. They was soliciting me for donations.

179 Q. Can you state who these agents or any of them were?

Ans. Yes, sir; E. S. Smith was one; very urgent; Capt. J. C. Ainsworth came to me at least twice and Gen. McCarver was at me very frequently, and Smith and McCarver each one separately and together were talking to me numbers of times about it—subsidy.

Q. Subsidy for the Northern Pacific Railroad Company?

A. Yes, sir; on condition that they would locate on Commencement bay.

Q. You may state whether the E. S. Smith named is the same E. S. Smith against the executors of whose estate, among others, this action is brought.

A. Yes, sir; the identical man.

Q. You may state whether or not during all the time from 1872, 1871 or 1872, on down to his death he remained in Tacoma, and

whether during a long part of that time he was the agent for the Northern Pacific Railroad Company in securing lands and one thing and another.

A. Yes, sir; he remained the most of that time in Tacoma, and it was my understanding that he was their accredited agent; he was very active in securing land donations and by purchase for the company.

Q. State whether you have any knowledge that during these early years, from 1871 down through 1873 and later, the same E. S. Smith, in the course of his land negotiations for the Northern Pacific Railroad Company, also secured large bodies of land to himself in various places.

180 Objected to by counsel for defendants as immaterial.

Ans. Yes, sir. He did to my positive knowledge; made large purchases in his own name.

Q. You may state whether he secured and left to his heirs a large landed estate in and about Tacoma.

Objected to by counsel for defendants as immaterial and irrelevant.

Ans. Yes, sir; he did leave a large number of acres and, I believe, lots.

Q. State, if you know, whether in the year 1873 and on down to the time of his death said E. S. Smith and the defendant W. H. Fife were in intimate business relations.

Objected to by counsel for defendants on grounds heretofore stated.

Red. E.—Carr, A. P.

Ans. It was my understanding that they were in business partnership at that time, and succeeding, in real-estate matters and coal mines, and I understand that the Smith estate and Mr. Fife are at the present time more or less commercially related.

Q. You mean in partnership?

Objected to by counsel for defendants as leading and on the grounds before stated.

Ans. Business partnership; yes, sir.

Q. You may state whether the relations of E. S. Smith and W. H. Fife at that time, 1873, and down later were known to be so
181 intimate that each must have surely known of all the considerable business transactions of the other.

Objected to by counsel for defendants as incompetent and irrelevant, as leading and for form.

A. It was generally understood, I believe, that E. S. Smith and Mr. Fife were closely related in business matters, and that in any matter of importance one must certainly have known what the other was doing.

Q. You may state whether or not, of your own knowledge, the

families of said E. S. Smith and W. H. Fife are intimately connected.

Objected to by counsel for defendants as immaterial.

Ans. E. S. Smith's son is married to Mr. Fife's daughter. They were married here in Tacoma, I believe.

Q. State whether the defendant M. G. Coggswell was in Tacoma in 1873 and at the time of the contest in this case.

A. My recollection is that Myron Coggswell and his father, Ira Coggswell, were both here at that time.

Q. State whether or not the contest referred to in the U. S. land office attracted at the time any general attention in Tacoma and was generally known.

Objected to by counsel for defendants as immaterial and irrelevant.

Ans. Yes, sir; it did. It was what was called then a big case and was generally talked about.

Q. State whether or not you always claimed, from the date
182 of the contest down, in Tacoma particularly, when it was spoken of, that you were the owner of that land.

Objected to by counsel for defendants as immaterial, irrelevant, and incompetent and as leading.

Ans. I did. I always claimed the land; never failed to claim it.

Q. You may state whether at any time you did anything to make your claims to the ownership of that land known through the public press. I mean after the contest in 1873.

Objected to as immaterial and irrelevant by counsel for defendants.

Ans. Yes, sir; I did. I gave notice to the public by an advertisement inserted in the Tacoma paper and paid for as an advertisement describing the land and warning all parties interested not to purchase of any one claiming to hold the land by any right; that I was the owner of it.

Q. State what was the name of the paper you published that warning in.

Objected to by counsel for defendants same as before.

Ans. The Tacoma News.

Q. You may state whether or not that was a paper of general circulation in Tacoma and throughout Pierce county at that time?

Same objection by defendants.

Ans. Yes, sir; the paper was generally taken and patron-
183 ized throughout the county and the Sound country.

Q. You may state whether or not defendants Coggswell lived in Tacoma when that notice was published.

Same objection by defendants.

A. Yes, sir; they did.

Q. State whether or not they have lived continuously in Tacoma for the past 14 or 15 years—all the defendants Coggswell.

A. It is my understant- that they have resided there continuously; that they do now.

Q. State whether or not you know, as a matter of fact, that they have at all events almost constantly lived here during that time.

A. Yes, sir; they have to my positive knowledge.

Q. State what relations the Capt. Ainsworth you mentioned bore to the Northern Pacific Railroad Company at that time.

Objected to by counsel for defendants as immaterial and irrelevant.

Ans. Capt. J. C. Ainsworth was one of the board of directors and the manager of the Pacific division.

Q. State whether or not in the year 1873, about the time of the contest in this case, there was any great excitement in and about Tacoma in regard to the prospect of the N. P. R. R. Company establishing the western terminus of its road at Tacoma, on Commencement bay.

Same objection by defendants' counsel.

184 Ans. Yes, sir; there was more excitement at Tacoma about the railroad at that time than at any other point on the Sound, so far as I know.

Q. You may state, if you know, what the result of that expectation was upon the general estimate of the values of lands anywhere in the neighborhood of Tacoma.

Same objection by defendants' counsel.

Ans. As near as I can recollect now the speculative value of land was greatly enhanced about that time.

Q. State whether or not it was generally expected in and about Tacoma at that time that its selection as such railroad terminus would make it in a short time a large city.

Same objection by defendants' counsel.

Ans. It was generally so considered and spoken of in that way.

Q. You may state whether the land in contest was or was not regarded at that time, in consequence of such expectation, as a tract of great prospective value.

Same objection by defendants' counsel.

Ans. It was spoken of as being a piece of land that would probably be worth considerable money in the near future.

Q. State, if you know, what, if any, relation existed at and about that time of the contest between said E. S. Smith and Robert E. Sproule, who filed the contest for abandonment against you.

Same objection by defendants' counsel.

185 Ans. Sproule told me after the contest that Smith had hired him, Sproule, for money, to jump my claim; that there was an agreement between him and Smith with that end in view.

Q. State, if you know, what the general reputation of said Sproule in and about Tacoma and all of Pierce county at that time was as to mercenary character and want of integrity in general.

Objected to by counsel for defendants as irrelevant, immaterial, and as leading.

A. Sproule was generally spoken of and looked upon as a bad man, and by some as a dangerous man. Of my own personal knowledge he stole $1,250 from his partner in Lincoln county, Nevada, and burned a mill and skipped; ran away from there before he came here. The documents setting forth these facts and a warrant for his arrest came to the sheriff at Steilacoom, then the county-seat, and the papers and the warrant was given to me to arraes Sproule on this charge. I dine so and took him to Steilacoom. While my contest was in progress in the land office at Olympia a stranger came to me and asked if I was the man having the contest with Sproule. I said "yes." Said the stranger: "I don't know anything about your claim nor you, but Sproule I know. He has been a neighbor of mine on the Willapaw, in Pacific county, in this Territory, and he is a damned bad man. He jumped a claim there and was run off of it; took another claim and used a boat belonging to an-
186 other man to cross the stream (the Willapaw, I think it was) back and forth and was in the habit of leaving the man's boat on the opposite side; and the man remonstrated with him about it, and Sproule, being a very passionate man, knocked or threw the man into the river, and he would have drowned except for help; and the neighbors got after Sproule, and if he had not run away they would have lynched him." This man offered to go there before the register and receiver and swear to this. He didn't know anything about me or my case.

Counsel for defendants moves to strike out the answer as not responsive to the question.

Q. You may state whether or not the same Sproule is the man who was generally believed throughout Pierce county to have set fire to the barn of Wm. B. Kelly, and whether or not he was endicted by the grand jury of Pierce for doing so.

Objected to by counsel for defendants as immaterial, incompetent, and irrelevant.

Ans. This man Sproule is the man that was accudes (and generally believed) with burning W. B. Kelley's barn and contents, and he was endicted by the grand jury on that charge, made his escape, and ran away.

Q. State whether or not he is the same Sproule who was hanged in Victoria, British Columbia, within the last two years for murder.

187 Objected to by counsel for defendants as immaterial and irrelevant.

A. He is the same Robert E. Sproule.

Q. You may state whether or not to your knowledge Spoule ever lived upon the land in question or cultivated any portion of it.

Objected to by counsel for defendants as immaterial, incompetent, and irrelevant.

Witness CARR, upon reading the transcript of his testimony, adds the following to his answer to question on page 60 of the transcript, said question being as follows:

"Q. State whether or not Sproule remained for any considerable time in Pierce county after that contest in 1873."

The addition to the answer in the transcript is as follows:

"After thinking the matter over I know it was in the summer of 1876—the Centennial year—that I met Sproule in San Francisco, and he then told me that he was going to Idaho; whether he did or not I don't know. Some time in the latter part of the summer or in the fall of 1879 he turned up here in Pierce county and was charged with burning Kelley's barn, and was arrested for that crime and broke jail and made his escape to British Columbia, and after that he never returned to this Territory."

188 Ans. No, sir; not to my knowledge.

Q. State whether or not Sproule remained for any considerable time in Pierce county after that contest in 1873.

Objected to by counsel for defendants as incompetent and irrelevant.

A. Yes, sir; he did remain here, and he built a small shanty that he claimed was on my land. I never ran that line after he built the house, but I was told by loggers that the house was just off of the ground. I don't speak of my personal knowledge as to the house.

Counsel for defendants moves to strike — all of the answer except the words "Yes, sir; he did," as not responsive to the question.

Q. You say in answer to the question of counsel on cross-examination that you did not think you stated to the R. & R. that the improvements made by you on the claim were worth but about $375. You may state what time you had reference to in stating the value of the improvements.

A. I wish to make a correction with regard to that, which now occurs to my mind. I understood Mr. Stiles here as cross-examining me on evidence I gave but a few weeks ago, and answering that question I confused my answer given a few weeks ago with my answer to the R. & R. I claimed that my total improvements were worth $800, and misunderstood Mr. Stiles as wanting me to say

that my total improvements were only worth $375. The im-
189 provements at the time of the contest in Olympia I might have stated at $350, but after the contest I put on more improvements on the homestead, and the aggregate I estimated worth $800. Since I made that statement to Mr. Stiles I saw that I had got it mixed in my mind.

Q. In relation to the stealing of your household effects from your house on the land in question, you may state whether or not you took there sufficient things to supply all necessaries after that.

A. Yes, sir; I took more articles there and they were taken. The place was robbed at least three or four different times or different periods of time. The house was broken open, as I stated, and after that it was very little use to fasten it. I put a screw-latch in the door, but it was no trouble to open it after it was forcibly broken open.

Q. State whether or not it is not a rather common experience out in this country to have one's claim, shanty, or claim-house robbed.

A. Oh, there is scarcely a claim in the country that isn't robbed that is isolated.

Q. You state that from about a year or so after the contest you lived in Tacoma. You may state whether or not you mean by that that you lived exclusively and solely in Tacoma. I mean by Tacoma, in the First ward.

Objected to by counsel for defendants as leading.

Ans. I shall make a statement that I had hoped would not
190 be necessary. In the fall and winter of 1873 my wife acted unfair; very bad. I lost all influence with her and control of her actions. She wouldn't go on the land any more, and early in the spring of 1874 she left my home and me and my boy and ran away with a scoundrel named Wentworth, and went to Victoria, San Francisco, Honolulu, and became a common prostitute and has been so ever since; left my boy, a child two years old or so, and I took care of him myself. He has remained with me ever since and is with me now. Consequently I could not be on the land so much. I went there frequently—worked there. Sometimes I took the child, sometimes I didn't. When a man has got no home really he ain't supposed to live anywhere.

Q. State whether or not you had sole charge of the child after the mother left.

A. I have taken care of the boy myself personally entirely and solely from the day she left until the present day; have kept him with me all the time; very few days, even, that I was obliged to be away from him; cared for him and attended to him myself individually to the present day.

Q. You may state, as near as you can recollect, what your practice was after the runaway of your wife in 1874 in regard to going out upon the land in question, and how frequently in the month or year you did go, and what you did, and how long you continued caring for it.

Objected to by counsel for defendants as immaterial and irrelevant.

191 Ans. I would go on the place and stay a day or two or three—as much as a week; maybe I wouldn't be there again for two weeks; maybe I wouldn't be there over two days for awhile. I had a pretty rough deal. I never abandoned the place.

Q. How long after 1874 did you continue this practice?

A. Until some time in the fall or winter of 1878 continuously at intervals and several times since then.

Q. You may state whether or not the education of your son, the child you refer to, made it necessary for you to sleep in town most of the time in the First ward.

A. Yes, sir; it did. But for the boy I should have been probably twice as much or more of the time on the land than I was during the succeeding time. I took sole care of him; nobody nor no woman helped me at all.

Q. In reference to the notification which you say you received from the district land office in regard to the contest and the finding of that office you say you remember the word "abandon" or "abandonment" especially. You may state why you remember that word particularly.

A. All that I had that I considered of any value, prospective value, was my homestead, and this letter from the register and receiver of the finding was of great importance to me, and I looked at it frequently. I read it over *as* frequently. I can swear positively point blank to the words of the finding. Shall I give

192 you the words? After addressing me, and the heading of the case, Sproulé *vs.* Carr, &c., were these words: "We find complainant failed to prove abandonment." There were a few other words, two or three, perhaps, and the usual ending of a letter and signed "Brown (I forget his name), register, and Stewart, receiver." I think it was a printed letter-head from the United States Land Office. I ain't dead sure of that.

Q. Then, as I understand, you regarded that information as a decision of the contest in your favor. State whether or not that is so.

Objected to by counsel for defendants as leading.

A. I did so decide it, certainly; did so understand it. I should say, I understood it as deciding in my favor.

Q. Why did you so understand it?

A. I understood in the contest that Sproule was the complainant. His only charge was voluntary abandonment for more than six months prior to the 6th day of June, 1873, and the words of this letter led me to think that the finding was in my favor.

Q. After the receipt of that letter from the land office, you may state what action you took in regard to prosecuting an appeal from *ing* the findings of the receiver and register to the Commissioner of the General Land Office. I mean whether you directed your attorneys to prosecute an appeal from the finding that you had not abandoned the claim.

193 A. No, sir; I did not. I didn't authorize them to make any further move. That is the only documentary evidence that letter referred to; was the only documentary evidence I ever got in relation to the matter.

Q. State whether or not you yourself afterwards wrote to the Commissioner of the General Land Office anything in regard to the contest.

A. I did this way: Some weeks after the contest, after the receipt of this letter, and I din't know how long, now, exactly, I heard by common report that Sproule had carried the matter up and was going to push it further. On the impulse of the moment of hearing this report I wrote a letter of explanation to the—I don't know whether it was to the Commissioner of the General Land Office—yes, of course it was. That is the way I came to write the letter.

Q. State if you recollect what the purport of that letter was.

A. The general tenor of it, as near as I can remember, was that I had not forfeited any right or abandoned my claim, with some expositions to the Commissioner of some of the acts on the part of the prosecution against my claim; but I was never notified from the land office at Olympia or officially otherwise to appear at the land office or make any personal defense after the receipt of this letter from the register.

Q. State whether or not you considered, down to the time of hearing that patent had issued to Sproule, that you were
194 the successful party in that contest and your rights remained untouched.

A. Yes, sir; I considered my rights in the case as good, the land as mine.

Q. You may state whether or not your attorneys in the contest in the district land office have ever presented any bill or made any charge to you for services rendered in your behalf in the appeal of this case before the Commissioner of the General Land Office and the Secretary of the Interior or before either of them.

Objected to by counsel for defendants as immaterial and irrelevant.

Ans. No, sir; they have not.

Hearing continued to Wednesday, April 25, 1888, 10 a. m.

195 TACOMA, W. T., WEDNESDAY, *Apr. 25th*, 1888.

Redirect examination of ANTHONY P. CARR, plaintiff, continued.

(By Mr. ARTHUR:)

Question. Mr. Carr, you may state whether or not the defendants W. J. Fife and George W. Fife are sons of W. H. Fife.

Answer. Yes, sir; it is my understanding that they are.

Ques. Do you know that as a fact?

Ans. Yes, sir; they are the sons of W. H. Fife.

Mr. ARTHUR: I believe that is all.

Cross-examination by Mr. STILES:

Question. Mr. Carr, during what period was it that you published the notice in the newspaper?

A. I cannot positively state now from memory. It was something like three, or maybe four, years ago. It was Mr. Patrick's paper. I am making an effort to get a copy of the paper.

Q. State where and when the conversation between yourself and Sproule occurred at which he told you that Smith had hired him for money to jump your claim, etc.

A. On two different occasions he made this statement to me voluntarily, and, as near as I can give you the date, it was perhaps a month, or maybe a little more, previous to the burning of Kelley's barn, that he got into trouble about. Then the second time was the period during which Sproule was—I forget whether he was
196 under bail for that charge of burning the barn or not, but I remember that he had been in jail and was out temporarily, and on that occasion he came to me and we had a conversation, and he repeated this matter to me without my asking him.

Q. In what year and month, as near as you can recollect, was the first conversation?

A. Well, just now I can't state. I don't know whether Kelley's barn was burned two years ago or three. It was just a short time before that, and the next conversation was a short time after, because almost immediately after my second conversation with him he made his escape from the officers of the law and disappeared, and I can't tell you even now whether it was two or three or four years ago; the time that has passed since then, I don't remember exactly.

Q. Was it before or after the commencement of the suit by yourself against the Tacoma Land Company and Puget Sound Company?

A. It was before that, before the commencement of that suit.

Q. How long before?

A. Well, before that; I can't state now.

Q. Whose barn did you say it was that was burned?

A. W. B. Kelley's, the man that was auditor here—up the valley here.

Q. Where was the barn that was burned?

A. It was on what is known as Fennel's prairie, owned by this W. B. Kelley.

197 Q. State all the conversation that occurred between yourself and Sproule the first time.

Re-re-C. E., Carr, A. P.

A. Well, I cannot give you the exact words; I can give you the substance. Sproule came to me on the road—that is, I was riding on the road and met or overtook Sproule, I don't know which—and he was friendly and communicative and wanted to talk—asked me to stop, he wanted to have a conversation with me. I did, and we sat down at the side of the road and he went on to tell me that he

was sorry for the part that he had done in trying to get my land; that he didn't want me to blame him too much, for he was not the most to blame; he blamed himself for being made a tool of, and that matters had been misrepresented to him by others or he never would have contested my land. This conversation extended over perhaps an hour or more, and I can't give you the exact words. In the course of this he said—he seemed to be very, I don't hardly know the term, you might almost say penitent—and repeatedly asked me to not think hard of him, he was led into it by others. He repeated that several times, and stated that his wife was part of the cause (his wife at this time had left him, gone off with another man). He told me that he had an agreement with E. S. Smith, by the terms of which, in substance, he was to jump my land and when he got title he was to deed it to Smith or whoever Smith indicated, and in return
198 he was to get his current expenses paid, have all the timber—logging timber, I understood him—that he could cut off of the land for one year and six hundred dollars in money; that Smith hadn't paid him a cent, hadn't contributed towards his support; that he couldn't make a living on the land in question, my homestead, and partly in consequence of that his wife had left him. He felt very bitter about that, and said, among other things, that anything he could do towards putting me in possession of the land which rightly belonged to me he would be glad to do and to call upon him for anything that he could do in that direction. Of course there was much more of this conversation than this, but that is the substance of what I can recall now. The second conversation——

Q. Who, if any one, was present at that conversation besides yourself and Sproule?

A. No one, sir; we were on the road out away from town at that time.

Q. Well, state where and when the second conversation occurred and what was stated.

A. The second conversation was after he had got into trouble about the burning of Kelley's barn, because he claimed to me then that he knew nothing about it; that he didn't do it and knew nothing about it, and the conversation was in general substance almost a repitition of the first.

Q. Was any one else present at the second conversation?

199 A. No, sir; he and I were alone.

Q. You state in your redirect examination that you knew of your own knowledge that Sproule had stolen $1,250 in Lincoln county, Nevada, from his partner and burned a mill there before he came here. Do you now mean to say that you knew that of your own knowledge?

A. My knowledge of these facts was acquired this way: I never was in Lincoln county, Nevada, but the papers, legal papers, charging Sproule with the crimes came to the sheriff of this county and, with an order for his arrest, was given to me to execute, and I read

them as a matter of course. That is the way I came by this knowledge.

Q. That is what you call your own knowledge, is it?

A. Yes, sir; reading the papers is what I claim. I didn't see him burn the barn or steal the money. I read the written charges.

Q. After you arrested him what did you do with him?

A. I delivered him to the sheriff in the jail.

Q. Well, state whether or not he was taken back to Nevada.

A. No, sir; he was not.

Q. How long did he remain in jail under that charge?

A. That I don't know; don't remember.

Q. How long was it afterwards before you saw him here at large?

A. He might have been in jail one day and he might have been there two or three months. I don't remember or know. I can't state.

200 Q. Which one of your attorneys was it, Mr. Carr, that you showed the letter to that you received from the register and receiver announcing the decision in the contest between Sproule and yourself?

A. I don't know which one of the Messrs. Allyn it was. I don't know which name belongs to which man. They are brothers and look alike considerably, and I couldn't say.

Q. You made a statement in regard to your wife, saying that in the fall and winter of 1873 you lost all influence with and control over her and her actions; that she wouldn't go out on the land any more, and early in the spring of 1874 she left my home?

A. Yes, sir.

Q. Did not that difficulty commence early in the year of 1873?

A. No, sir; we had no trouble until—I think about October, 1873, was the first jar.

Q. Was not your wife about the 1st of June, 1873, with child, and did you not, in consequence of that, for several months before the 1st of June, 1873, and for some time after that make your home entirely at Tacoma?

A. With regard to her, that was the case; with regard to making my home in Tacoma, I did not. I was part of the time on my homestead, but she very seldom went there.

Q. What time was it in the year 1873 that she ceased to go to the claim—to the homestead?

A. If I remember right, I think the last time that she
201 went there was shortly after the 4th of July; how many days after I din't remember.

Q. Were you not the plaintiff in a case in the district court in and for the county of Pierce, about 1883, against The Tacoma Land Company and The Lake Superior and Puget Sound Company, in which there was a controversy over the S. W. ¼ of the N. W. ¼ of sec. 32, t'p 21 N., of R. 3 east?

A. Yes, sir.

Q. Did you not on the 21st day of May, 1883, and on the following day give your testimony in that case before Elwood Evans, referee?

A. Elwood Evans was referee in the case. I cannot verify those dated; probably they are correct.

Q. Did you not, in response to question upon cross-examination put to you, answer the question, in substance, whether you lived with your wife, in the ordinary relations of husband and wife, in the summer of 1873, answer, "I did not live hap-ily at that time"?

A. I don't remember; possibly I made such a statement.

Q. In response to the question, "At what particular time did you live unhappily?" did you not answer, "From early in the year 1873 thenceforward"?

A. I don't remember if I made such an answer.

Q. If you made that answer, was it true or not?

A. Altogether owing to what standard of comparison is set up to judge by. I take it that everybody is comparitiv-ly happy
202 or unhappy at any and all times, as the case may be. My affairs in 1873 were financially and socially very much disturbed.

Q. How were you financially disturbed?

A. I didn't have money that I thought I stood in need of to live as I would like to have.

Q. Was that — you meant when you said, "I didn't live happily at that time," if you said so?

A. Very probably that had a bearing.

Q. In response to the question, "You lived with your wife in the same house that year or the greater part of it?" did you not answer, "Part of the year; perhaps half of the time"?

A. I may have made such a statement as that.

Q. In response to the question, "What time in 1873 did you cease to live with your wife in the same house?" did you not answer, "I was at home and absent by turns all of the year 1873"?

A. Maybe I made that answer; I don't remember.

Q. In response to the question, "You lived with your wife in the same house that year or a greater part of it, did you not?" did you not answer, "Part of the year; perhaps half of the time"?

A. I answered that, didn't I?

Q. I think so. In response to the question—I now ask you, Mr. Carr, to answer my questions directly—Were you in the
203 house on the dates covered by the former questions (referring to the 29th and 30th of June, 1873)? did you not answer, "I was at home on the 30th day of June, 1873"?

A. It may be that I made such an answer; I cannot remember now.

Q. In response to the question, "Do you mean by 'at home' the house where you and your wife lived together in Tacoma?" did you not answer, "Yes, sir"?

A. Possibly I did; I don't remember now.

Q. Did you not at that time fix the fact of your having been at home on the 30th day of June, 1873, by that fact, that your wife upon that day fell down the front steps of your house and injured herself?

A. Yes, sir; that was the house in town and not at the homestead.

Q. Now, when you said, "I was at home and absent by turns all of the year 1873," what place did you mean to designate as the place where you were at home—the place in town or this homestead?

A. The homestead was my home; the only one I claimed.

Q. Please answer my question, Mr. Carr. (Question read.)

A. The homestead.

Q. Did you not mean the place where your wife fell down the steps and injured herself on the 30th day of June, 1873?

A. Not as my home.

Q. Did you not in giving your testimony at that time
204 speak of that place and mean that place when you spoke of home?

A. No, sir. I owned that place referred to.

Q. That place in town was the place, and the one which you have spoken of in your former testimony in this case was the place, was it not, where your wife lived, remained, during the time that she was with child, and where she fell down the steps?

A. That is where she fell down the steps.

Q. And that is the place where she remained until her confinement, some time afterwards, was it not?

A. Yes, sir. There was no neighbors and no conveniences at the homestead.

Q. In response to the question, "Did you keep house during all of the year 1873?" did you not answer, "Yes, sir"?

A. I don't remember if I did answer so.

Q. Did you keep house all the year 1873?

A. Well, as I told you a bit ago, I was very much disturbed and exercised at that time, and I don't remember; maybe there was a part of 1873 that I didn't.

Q. In response to the question, "Where were you on the 25th of June, 1873?" did you not answer, "I was at home"? and to the further question, "And on the 27th of the same month?" did you not answer, "Yes, sir"? and to the further question, "And on the 28th?" did you not answer, "Yes, sir"? and to the further question, "And on the 29th?" did you not answer, "Yes, sir"?
205 and to the further question, "And on the 30th?" did you not answer, "Yes, sir"?

A. Well, I might have made those responses to those questions; I don't remember now.

Q. If you so answered, that you were at home on the days about which you were questioned, did you not mean at home at your house in Tacoma?

A. If those question- (which I do not now see the connection) referred to my home as my home, I referred to my homestead; if it referred to the place as where my wife was being confined by her condition and accident, it was the place in town. There is a difference with a distinction to it.

Q. In response to the question which was asked you referring to

the time during which you remained with your wife after her fall, were you not asked the question, "You remained in attendance during that interval of sickness?" and did you not answer, "Yes, sir"?

A. Well, I don't remember; I might have made such an answer.

Q. Is it true that after she did fall that it was three or four days before she resumed her household duties?

A. I presume it was three or four days or a week.

Q. Where did she resume her household duties when she did resume them—at the house in town or on the homestead?

A. When she first done work she done work there at that house in town.

Q. She continued to do what work she did after that until her confinement at that house, did she not?

206 A. Yes, sir; at that house. When she got able to do the work I went to the homestead, where she wouldn't go.

Q. Do you remember testifying in this same case, Mr. Carr, to the fact that on the 3rd day of July, 1873, Gen. McCarver Ackerson, G. O. Kelley, George E. Atkinson, a man named Shannon, William Ackerman, and Job Carr, your father, came to your house to see you about a bonus—about giving a bonus to the Northern Pacific Railroad Company?

A. Yes, sir.

Q. To what place did they come?

A. My father and General McCarver came to where I was at work on the homestead and talked with me there, and wanted me to come to town and talk with me particularly and Mr. E. S. Smith, as he was credited with being the railroad agent. I didn't care to subsidize and didn't care to talk with them on that subject, but finally I did come to town and I talked with all these gentlemen named in Tacoma.

Q. Did you not say in response to a question that was asked you at that time in that case, "Did you keep equally close to your house on the 2nd day of July, 1873, as you did, according to your testimony, on the two preceding days?" and did you not answer, "Yes, sir; about the same"?

A. Possibly I did.

Q. And in response to the next question, "Did you keep equally close on the 3rd day of July?" did you not answer, "Yes, sir; I was at home all day the same"?

207 A. I cannot tell you if I said that.

Q. If you said so, was it true or not?

A. According to the construction you put on it. I took half a window—the half window I was putting in my kitchen on my homestead—and went out there to put it in, and shortly after General McCarver and my father followed me out there to have a talk with me about the subsidy.

Q. If you said "I was at home all day the same," did you not mean that you were at home at your house in Tacoma all of that day?

A. No, sir. I wasn't at home in the house at Tacoma all that day.

Q. Did you not mean to say so at that time?

A. I cannot say now what I then meant.

Q. Did you not state in response to questions asked you at that time, with reference to these gentlemen coming to see you, that they came to your house, beginning with McCarver, Starr, and your father, by twos and threes at a time during all the forenoon?

A. I can't remember if I made such a statement.

Q. In the course of your testimony at that time did you say anything about McCarver, Starr, and your father's coming to your homestead?

A. No; Starr didn't come to the homestead. On the 4th of July, the next day, my father and I started to Olympia, and before
208 going to Olympia I wanted to make a demonstration on the homestead partly and partly to escape these men that were soliciting me so very persistently for bonus, because I wasn't on the subsidize; everybody knew that then and know it now; and partly to escape their solicitations I took this half a window and went to the homestead and McCarver and my father, not Mr. Starr, followed me directly out, and I had been there a few minutes before they came and I came back with them.

Q. Did not the whole matter of the proposition that you subsidize the Northern Pacific Railroad Company with a gift of land terminate with the exchange of some papers on the 3rd day of July, 1873?

A. If I recollect right now, it did, in the evening.

Q. Then why, after it was all over, on the 4th of July did you desire to escape them by going to Olympia or Steilacoom, whichever it was?

A. I didn't go to Olympia to escape them; I went from my place in town to my homestead on the 3rd. That is what I wished to be understood.

Q. You have stated, in response to the questions of counsel and my cross-examination, that your financial ability was limited at that time, and that you were unable to do otherwise than as you did upon this land. Is it not a fact that at all times from June 28th, 1871, to June 6th, 1873, and thereafter for some time, that you were in possession, the owner and in possession of, or claimed to be in possession of, lot 3, in section twenty-nine, township twenty-one
209 north, of range three east, containing twenty-three acres, and also the south half of the northwest quarter of the northwest quarter of section thirty-two, one hundred and twenty acres of land, which you had theretofore had patented to you by the United States as a pre-emption claim?

A. No, sir; I didn't own that land at that time.

Q. When before that, if ever, had you owned it?

A. If I have got the description right in my mind, that was a part or nearly all of my pre-emption claim which I had sold to different parties previous to 1870; the exact dates I do not remember.

Q. Were you not then claiming and exercising rights as owner

over the southwest quarter of the northwest quarter of section thirty-two, forty acres?

A. Yes, sir.

Q. Did you not have leased to Hansen and others the west half of the northwest quarter of the northwest quarter of section thirty-two, twenty acres, at thirty dollars per month rent?

A. Yes, sir.

Q. Did you not have forty acres which you purchased from Thomas Gibson, in section eight, adjoining this homestead claim or near it?

A. I bought forty acres of Gibson about those days. I can't tell you whether it was at that time or not. I don't remember about that. I sold it since then. I presumed I owned it then. It
210 was of no source of revenue at all, only to pay tax on; none whatever.

Q. When was it that your wife went away?

A. Early in 1874; about the 1st of February; the exact date I don't remember.

Q. Was it not in 1875?

A. No, sir; 1874.

Q. Did you not, Mr. Carr, in the course of your testimony in this case I have referred to, make the statement that it was in January, 1874, and did you not afterwards correct yourself by stating positively that it was in 1875, in January?

A. Well, now, about that I may be mistaken. I'll tell you what, I get mixed in my mind and want to be understood now as trying to make an explanation. My sister was drowned by the wreck of the steamer Pacific in November, 1874. Well, then, I was mistaken in the dates. I possibly was. Well, it may be it was February, 1875, and maybe it was 1874. I know there was a long time that my wife wouldn't go on the homestead. I went there alone.

Q. Did you not state positively in the case in which you testified that I have referred to, after reflection and after having time to collect yourself, that you were in error as to its having been in January, 1874, but that it was, in fact, January, 1875, that your wife went away?

A. Well, I can't answer you that now.

211 Q. How often after her confinement in 1873 did your wife visit the homestead?

A. She might not have went there at all that I know of now. I went there as frequently as I could.

Q. You have spoken, Mr. Carr, in your redirect examination of the improvements that you made after this contest with Sproule. Now, I want you to re-detail all the improvements that you made on that land at any time, first specifying those distinctly which you made prior to Sproule's contest and, secondly, those which you made after the contest.

A. The first improvement I made was the building of a cabin that was nearer to where Carson's mill now is, on the county road and old road. I didn't find water there and hunted about over the land and did find water in another place. There I started to build

another cabin and carry the lumber on my back from the cabin I had put a roof on and a floor in up to this second cabin. When I had carried one hundred or two hundred feet, perhaps, of the lumber, Davison came along and spoke about my "sole cart," as he called it—to carry on a man's back—and wanted to sell me his claim-house, which was a board house he was done with, as he had proved up, and I struck a bargain with him; bought his house and then tore away the foundations, three or four logs high, of the log cabin, the second one, that mt father and I had commenced to build.

212 Then I went at it and cut this road I spoke of, running from the county road out to the prairie, to my place, something over half a mile. Davisson's house stood right close by where I started in this road, and after——

Q. Excuse my interrupting you, Mr. Carr, but I asked you simply to state the improvements which you made before the contest with Sproule and any improvements afterwards. It is not necessary for you to dilate upon where you got the stuff or anything about it.

A. I was going to show why I made these two improvements. Then I tore down Davison's house and hauled it in there and put up the lumber house spoken of; that was before the contest, and I had lumber hauled out from Tacoma before the contest, and I also had two and maybe three loads hauled out after the contest—that is, the 7th, I think, or 8th of July—and went on with my cutting and burning and clearing and slashing and work as I could spare the time from work in town.

Q. Is that all?

A. Unless you want a description of it.

Q. I want you to state distinctly now what work it was that you did in the way of improvements on the claim after the contest with Sproule had been commenced.

A. After the contest with Sproule I put a lean-to kitchen on the house and a window in that, finished up the chimney of the fireplace and done more clearing and burning.

Q. How much did the clearing and burning that you did after the Sproule contest amount to?

213 A. I should judge that I cleared and burned over three or four acres.

Q. About what time was it that you did the last work on that claim?

A. Well, I can't remember the exact time. It was since I bought the place where I now live in the country that I — been there on the homestead. I judge it has been possibly five years. I cannot certainly remember the exact even number of years; it may have been more than that; I don't remember. Time goes by very fast, but I have been there at work on the homestead since I have been in the country.

Q. How long have you been in the country?

A. It is eight years, nine years in March last.

Q. What work did you do there since that time?

A. The last time that I was in there there was some piles of brush and logs that I had piled up before; particularly some large

logs that were partly rotten and had thick, heavy, wet bark on that I had pealed and piled up there some time before, and I noticed that and burned that and chopped brush, burned brush. I remember that because when it was first piled it was green and wet, wouldn't burn.

Q. Had any portion of that land, after you filed upon it, been logged?

A. Yes; after I filed upon it.

Q. Any of it done with your consent?

A. No, sir; I never sold a stick off of it.

214 Q. Did you not, between the time of your filing and the time of Sproule's contest, contract with some one representing the Tacoma Mill Company, and did not that person with whom you contracted take a quantity of logs from there?

A. No, sir; not a log; not a contract; no, sir.

Q. In the course of your testimony before the register and receiver in the contest with Sproule, did you not testify to you having made a contract of that sort, under which trees were cut and logs were taken from this land?

A. No, sir; not from the homestead; it was from the Gibson forty.

Q. Are you as positive of that as you are of anything else which you have testified to here?

A. I am positive about it because I hadn't title. The loggers, Dougherty, in cutting off the Gibson forty, which I had purchased, cut over onto the homestead, and I stopped him.

Q. Did you state in the course of that examination before the register and receiver that you had inquired of a lawyer as to whether you had a right to cut and remove timber from your homestead, and that thereafter you made this contract?

A. A lawyer told me that I could have logs cut off the homestead to improve the homestead with; not to cut off to sell.

Q. Did you state that in your direct examination before the register and receiver?

215 A. I think I did. If I had been questiones I should have certainly stated so. I told Dougherty not to cut the timber off the homestead, and then I went to see a lawyer, and he so informed me; told me I could take logs off the homestead to improve the homestead with, and that I could take timber off the homestead and trade it for lumber to be used in improving the homestead.

Q. What was the man's name that you permitted to take logs?

A. Dougherty.

Q. Did you make such a contract with a man named Simmons?

A. No; Simmons was to cut the Gibson claim. Dougherty cut part of the Gibson claim and left, and Simmons took the Gibson claim to cut. Simmons did not have any contract with me to cut timber on the homestead.

Q. How much of the homestead was there cut over by these men?

A. I think Dougherty cut 15,000 feet; that was his statement, which was all I had to go by, when I stopped him, and he never

logged there any more, because he said if he couldn't go on and log the homestead off it wasn't worth his trouble and time.

Q. Was it not a fact there were from 600 to 800 trees cut on that homestead claim by Simmons under that contract with you?

A. No; not by any contract with me. Sproule cut timber off the homestead and hauled it down the Simmons road, but Sproule didn't get any contract with me to cut it and neither did Simmons. I was afraid to have it cut.

216 Mr. STILES: That is all, Mr. Arthur.

Re-redirect examination by Mr. ARTHUR:

Question. In referring to the date of the burning of William B. Kelley's barn by Sproule, as alleged, you mentioned two years ago or three years ago as such date. You may state whether or not that is an error of memory as to the number of years.

Answer. Oh, yes. I couldn't begin to state when Kelley's barn was burned; I couldn't state within two years; I don't pretend to give the date within two years of when Kelley's barn was burned. The facts I am cognizant of; the facts, not the date.

Witness Carr desires to add to his answer to the first question of Mr. Arthur on his re-redirect examination on page 73 of the transcript and at the end of said answer the following:

"After having time to reflect upon this matter I can now state that it was in the year 1879 that the Kelley barn referred to was burned."

Ques. You state it was before the bringing of suit by you against the Tacoma Land Company that you had these conversations with Sproule?

A. That was merely my recollection on the moment. They might have pretty nearly occurred at the same time and I
217 not remember the exact occurrence. There may be a small time between the two, and which came first I don't state now. I wouldn't be that precise, for I don't remember; just trusting to memory.

Q. In reply to questions on recross-examination I understand you to say that some papers were exchanged on July 3rd, 1873, between you and the railroad agents concerning subsidy.

A. Yes, sir.

Q. You are correct with regard to that?

A. My recollection is that I bonded this Gibson forty that I spoke of a bit ago to the railroad company conditional with their agreements with me to locate and build a railroad.

Q. You may state whether or not your memory is clearer as to events and incidents than as to number of years since their occurrence or the time of their occurrence.

A. I remember the occurrences and incidents much plainer than I do the term that may have elapsed since then. Scenes that I take part in—act in—I am slow to forget.

Mr. ARTHUR: I believe that is all.
Mr. STILES: That is all.

ANTHONY P. CARR.

Closed.
Subscribed and sworn to before me this 9th day of October, 1888.
C. B. EATON, *Referee.*

218 Plaintiff offers in evidence copied of certain papers, which are filed with this report, marked "Pl'ff's Exhibit D."

Plaintiff rests.

The following are copies of documents which it is agreed by counsel for plaintiff and defendants are correct copies of original documents on file in the General Land Office in the contest of Sproule *vs.* Carr:

1. *Receiver's Receipt No.* 1368; *Application No.* 1368.

Homestead.

RECEIVER'S OFFICE, OLYMPIA, W. T., *June* 28, 1871.

Received of Anthony P. Carr the sum of twenty-two dollars, being the amount of fee and compensation of register and receiver for the entry of W. ½ of N. E. ¼ & E. ½ of N. W. ¼, section 8, in township 20 north, of range 3 east, under the acts of Congress approved May 20, 1862, and March 21 (section 2290, Revised Statutes of the United States), 1864, entitled "An act to secure homesteads to actual settlers on the public domain."

$22.00. F. M. LAMPER, *Receiver.*

2. Homestead.

LAND OFFICE AT OLYMPIA, W. T., *June* 28, 1871.

I, Anthony P. Carr, having filed my application, No. 1368,
219 under the provisions of the act of Congress approved June 20, 1862, and desiring to avail myself of the 25th section of the act of July 15, 1870, in regard to land held at the minimum price of $2.50 per acre, do solemnly swear that I am the identical Anthony P. Carr who was a private in company B, commanded by Captain W. W. Dudley, in the 19th regiment of Indiana vols., commanded — S. Meredith, in the war of 1861, and that I continued in actual service for ninety days and have remained loyal to the Government; that said application No. 1368 is made for my exclusive benefit and for the purpose of actual settlement and cultivation and not, directly or indirectly, for the use or benefit of any other person or persons whomsoever, and that I have never heretofore had the benefit of the homestead law.

ANTHONY P. CARR.

Sworn and subscribed before me this 28th day of June, 1871.
J. P. CLARK, *Register.*

3. Homestead.

Application No. 1368.

LAND OFFICE AT OLYMPIA, W. T., *June 28th*, 1871.

I, Anthony P. Carr, of Pierce county, W. T., do hereby apply to enter, under the provisions of the act of Congress approved May 25, —, entitled "An act to secure homesteads to actual settlers on the public domain," the W. ½ of the N. E. ¼ & E. ½ of N. W. ¼ of section 8, in township 20 N., of range 3 E., containing 160 acres, at
220 $2.50 per acre, under the act of July 15, 1870.

ANTHONY P. CARR.

LAND OFFICE AT OLYMPIA, W. T., *June* 28, 1871.

I, J. P. Clark, register of the land office, do hereby certify that the above application is for surveyed lands of the class which the applicant is legally entitled to enter under the homestead act of May 20, 1862, and that there is no prior valid adverse right to the same.

J. P. CLARK, *Register.*

4. *Notice.*

LAND OFFICE AT OLYMPIA, W. T., *June* 6, 1873.

Complaint having been entered at this office by Robert Sproule against Anthony P. Carr for abandoning his homestead entry No. 1368, dated June 28, 1871, embracing W. ½ of N. E. ¼ and E. ½ of N. W. ¼, section 8, township 20 north, of range 3 east, in the county of Pierce, W. T., with a view to the cancellation of said entry, the parties are hereby summoned to appear at this office on the 17 day of July, 1873, at one o'clock p. m., to furnish testimony concerning said alleged abandonment.

J. P. CLARK, *Register.*
ROBERT G. STUART, *Receiver.*

221 NOTE.—The fact and date of service upon the homestead settler should be endorsed on the notice.

Endorsement.

Executed by delivery to Anthony P. Carr a copy of the within notice and reading said notice to said Anthony P. Carr at the time of delivery to him the copy aforesaid. Done this 11th day of June, 1873, at Tacoma, Pierce county, W. T.

D. W. C. DAVISSON, *Sheriff,*
By G. M. GRAINGER, *Deputy.*

5. *Extract from Decision of Register and Receiver.*

From the testimony of claimant and his father it appears that claimant hts been upon the place within 6 months immediately prior to June 6, 1873, the date of inception of this contest, has slept there perhaps two or three times, and that late in spring he had a cooking stove there, which was removed in April or May.

From these occasional visits to the claim we can but draw the conclusion that said A. P. Carr did not wholly abandon his claim, but we are more strongly of the opinion that the utter disregard of the spirit of this beneficent law, which gives to the poor man upon easy and reasonable terms what he could not otherwise obtain, would in equity be sufficient ground for cancellation of the homestead entry, No. 1368, of Anthony P. Carr.

Olympia, W. T., August 10, 1873.

J. T. BROWN, *Register.*
ROBERT G. STUART, *Receiver.*

222 Endorsed: In dist. court. Anthony P. Carr, pl'ff, *vs.* W. H. Fife *et al.*, def'ts. Plaintiff's Exhibit "D," C. B. Eaton, referee. Filed Nov. 26, 1888. A. Reeves Ayres, clerk, by L. O. Abbott, deputy clerk.

TACOMA, W. T., *October* 9, 1888.

Mr. Stiles, attorney for the defendants, after stating that the defendants would offer no oral testimony and would produce no witnesses, offered the following documentary testimony in evidence:

1. Defendants offer in evidence certified copy of record contest in case of Robert E. Sproule against A. P. Carr, case No. 1368, Olympia, Washington Territory, land office series, for the W. ½ of N. E. ¼ and E. ½ of N. W. ¼ of section 8, t'p 20 north, of range 3 east.

Plaintiff objects to the introduction in evidence of any part of the record referred to except the findings, rulings, and decisions of the land office as incompetent and irrelevant.

223 (Record marked for identification Def'ts' Exhibit 1.)

2. Defendants also offer in evidence the testimony of Anthony P. Carr, taken before Elwood Evans, Esq., referee, in a certain action heretofore pending in the district court of the (then) third judicial district of the Territory of Washington, holding terms at New Tacoma, in and for the county of Pierce, entitled Anthony P. Carr, plaintiff, *vs.* The Tacoma Land Company and Lake Superior and Puget Sound Company, defendants, the testimony aforesaid having been taken pursuant to an order made and entered in said action on the 21st day of May, 1883.

Plaintiff objects to the introduction of said testimony as incompetent and irrelevant.

And it is stipulated by and between the counsel to this cause that if said testimony is admitted in evidence by the court over the objection of the plaintiff that instead of the original record of said testimony the printed copy of same contained in the printed pamphlet filed herewith and marked "Def'ts' Exhibit 2" be used on the trial of this cause.

3. Defendants also offer in evidence the patent of the United States to Robert E. Sproule, dated December 13th, 1875, for the W. ½ of the N. E. ¼ and the E. ½ of the N. W. ¼ of section 8, t'p 20 north, of range 3 east, the land in controversy in this cause.

224 And it is hereby stipulated by and between the parties to this cause that the copy of said patent filed herewith and

marked "Def'ts' Exhibit 3" be substituted for the original instrument for the purposes of this cause.

4. It is also stipulated by and between counsel in this cause that the abstract of title made by Messrs. Gloyd & Spinning October 28, 1887, filed herewith and marked "Def'ts' Exhibit 4," for the W. ½ of N. E. ¼ and E. ½ of section 8, t'p 20 north, of range 3 east, the land in controversy in this cause, may be used and referred to on the argument of this cause in lieu of the original instruments or copies thereof abstracted therein.

Plaintiff closes.

Defendants close.

TERRITORY OF WASHINGTON, } ss:
County of Pierce, }

I, C. B. Eaton, appointed by the court to take the testimony in this cause and report the same to the court, do hereby certify that the witnesses who severally gave the within and foregoing testimony were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that said testimony was by me reduced to writing in the presence of said witnesses, and that they testified as is hereinbefore set forth.

225 And I do further certify that the within and foregoing is a true and correct copy of the testimony and all the testimony so given by the persons severally named before me as referee as aforesaid, and that the same is a true and correct copy and report of all the testimony given or offered before me by either or any of the parties to said action and a true and correct copy and report of my proceedings as such referee.

In witness whereof I have hereunto set my hand, at the city of Tacoma, in the county of Pierce and Territory of Washington, this 11th day of October, A. D. 1888.

C. B. EATON, *Referee.*

In the District Court at Tacoma.

A. P. CARR, Plaintiff,
vs.
W. H. FIFE *et al.*, Defendants. } Referee's Bill.

To eight days taking testimony at $5 per day	$40 00
" transcribing 375 folios of testimony at 20 cents per folio	17 40
Total	$111 40

Tacoma, W. T., October 9, 1888.

——— ———, *Referee.*

226 & 227 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Sept. 28th*, 1887.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed copy of homestead entry papers,

No. 1368, Olympia, W. T'y, series, in name of Anthony P. Carr, for W. ½ N. E. ¼ and E. ½ N. W. ¼, sec. 8, t'p 20 N., R. 3 E., together with record of contest in case of Robert E. Sproule *vs.* A. P. Carr involving said entry, also office decision of Secretary & letter closing case, are true and literal exemplifications from the original papers on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] WM. A. J. SPARKS,
Commissioner of the General Land Office.

228 *Receiver's Receipt No.* 1368; *Application No.* 1368.

Homestead.

RECEIVER'S OFFICE, OLYMPIA, W. T., *June 28th*, 1871.

Received of Anthony P. Carr the sum of twenty-two dollars — cents, being the amount of fee and compensation of register and receiver for the entry of W. ½ of N. E. ¼ & # ½ of N. W. ¼ of section 8, in township 20 north, of range 3 east, under the acts of Congress approved May 20, 1862, and March 21, section No. 2290, Revised Statutes of the United States, 1864, entitled "An act to secure homesteads to actual settlers on the public domain."

$22.00. F. M. LAMPER, *Receiver.*

(On margin of said page is the following:
"Act of July 15th, 1870.")

Homestead.

LAND OFFICE AT OLYMPIA, W. T., *June 28th*, 1871.

I, Anthony P. Carr, having filed my application No. 1368, under the provision of the act of Congress approved June 20, 1862, and desiring to avail myself of the 25th section of the act of July 15th, 1870, in regard to land held at the minimum price of $2.50 per acre, do solemnly swear that I am the identical Anthony P.
229 Carr who was a private in company "B," commanded by Captain W. W. Dudley, in the 19th regiment of Indiana vols., commanded — G. Meredith, in the war of 1861, and that I continued in actual service for ninety days and have remained loyal to the Government. The said application No. 1368 is made for my exclusive benefit and for the purpose of actual settlement and cultivation and not directly or indirectly for the use or benefit of any other person or persons whomsoever, and that I have never heretofore had the benefit of the homestead law.

ANTHONY P. CARR.

Sworn and subscribed before me this 28th day of June, 1871.
J. P. CLARK, *Register.*

(Endorsed:) Olympia. H'd 1368.

Application No. 1368.

Homestead.

LAND OFFICE AT OLYMPIA, W. T., *June 28th*, 1871.

I, Anthony P. Carr, of Pierce county, W. T., do hereby apply to enter, under the provisions of the act of Congress approved May 20th, entitled "An act to secure homesteads to actual settlers on the public domain," the W. ½ of N. E. ¼ & E. ½ of N. E. ¼ of section 8, in township 20 N., of range 3 E., containing 160 acres, at $2.50 per acre, under act July 15th, 1870.

ANTHONY P. CARR.

230 LAND OFFICE AT OLYMPIA, W. T., *June 28th*, 1871.

I, J. P. Clark, register of the land office, do hereby certify that the above application is for surveyed lands of the class which the applicant is legally entitled to enter under the homestead act of May 20th, 1862, and that there is no prior valid adverse right to the same.

J. P. CLARK, *Register.*

(Endorsed:) Olympia, W. T. 1368. 1368. Olympia, W. T. Forfeited. See letter to R. & R., Oct. 16, 1873. Pierce. See letter to the Secretary of the Interior, Jan'y 31st, 1874, transmitting all the papers in the case on appeal. See letter from R. & R., Sep. 4, '73. R. 68–006, Pierce. Secretary's decision & testimony in (see letter to A. P. Carr) special files L. 420. May 5, 1874. D. & P. Canceled. See letter to R. & R., May 9, 1874. Pierce. See letter to Mitchell, Jan'y 14, '82. See letter to Carr; also Dec. 13, 1881. D. & P. April 7, 1883. 5. N. & E. 51.

231 UNITED STATES DISTRICT LAND OFFICE,
OLYMPIA, W. T., *September* 8, 1873.

Hon. Commissioner General Land Office, Washington, D. C.

SIR: Enclosed herewith find notice of appeal from the finding of this office in the case of Robert Sproule *vs.* Anthony P. Carr, No. 1368, with agreement of Carr's counsel and reply of Sproul's attorney.

This is in addition to papers accompanying our letter of 4th inst.

Very respectfully, J. T. BROWN, *Register.*
ROBERT G. STUART, *Receiver.*

Endorsed: U. S. district land office, Olympia, W. T., Sept. 8, 1873. K. 68599. Register & receiver. (6) Forwarding additional papers in case of Sproule *vs.* Carr, h'd No. 1368. First transmitted Sept. 4, 1873. C. Sept. 22, '73. Three enclosures.

232 In the Matter of the Homestead Entry No. 1368, tried before local land office at Olympia, W. T'y, July 17th, 1873.

ROBERT SPROULE, Contestant,
vs.
ANTHONY P. CARR, Claimant.

To the honorable Commissioner of the General Land Office:

We trust our extended argument may find both excuse and justification in the peculiar nature of the case, in the peculiar nature of the finding itself, in the voluminous testimony, in the many important and numerous new principals involved.

The claim, too, which is the subject of controversy has pending the trial, for causes well known, though entirely fortuitous, assumed great value, so great, indeed, as to probably take the case to the tribunal of last resort.

For these reasons we desire to give it a thoroughness of investigation that otherwise might be thought unnecessary, and therefore, with due respect to the register and receiver, we submit the following:

1st. Their findings of fact are not sustained by the evidence adduced and in some instances in conflict with the testimony.

2nd. Their conclusions are at variance with the supposed findings upon which they are based.

233 3rd. A tendency throughout the case to impose the burden of proof upon the claimant, Carr, instead of the contestant, Sproule.

4th. A misconception of the issue in requiring of Mr. Carr such proof as one is required to furnish in final proof and not that of one called upon to respond to the alleged charge of abandonment.

5th. In the rejection of testimony offered by claimant essential to his case.

6th. In the admission of testimony in behalf of contestant of like kind to that refused to claimant.

7th. In their refusal to allow such rejected testimony to be given and placed upon the record that the same might be passed upon by the honorable Commissioner or such other tribunal as this case might be brought before.

Let us consider the finding in the light of the above objections. It is found a house was and still is upon the claim, but no finding as to the character of the house save the opprob-ium that seems to attach to the italicised term, "*Claim-house.*"

Opinion, page 1: Upon the alleged *condition* of witness of the house no finding is made, and for the present we pass it. "It is shown that the claimant with his wife and child had their actual residence in Tacoma, a small hamlet two miles distant from this claim, during all the time from the inception of claim to the
234 present time, where he is known as a photographer and doer of odd jobs, and at no time has he had an actual or constructive residence upon this claim." Opinion, page 2.

We think the testimony does not justify the conclusion. No wit-

nesses testify that Mr. Carr abandoned the claim but by attempting to show residence elsewhere.

It is sought to show the claim must have been abandoned. Evidence of the negative and inferential nature offered to establish this proposition should be full and — to outweigh the direct testimony of claimant that he did reside on the claim and has never abandoned it.

To establish this proposition only four witnesses are called, viz., Steele and Hanzleman (whose visits to the house on claim were confined to six weeks before trial) and Atchinson and Bottsford (neither of whom have ever been upon said claim). Mr. Carr testifies to living on the claim and instances days and nights spent there abundantly sufficient, if true, to make him a *bona fide* settler.

No attempt was made to impeach Mr. Carr's veracity. We say the testimony of the above four witnesses is consistent with his evidence. Mr. Steele says, "Have not known the whereabouts of claimant Carr for last six months."

"He might or might not have been absent (from Tacoma) for a week and I not known it." When asked if Carr might not have been absent from Tacoma a month and he not know it re-
235 plies, "he does not know;" says he does not know of Carr abandoning claim for six months.

Folio 12 and 13: Mr. Atchinson "thinks Carr and family might have been two days at time on claim and I not know it."

That Carr's going to the claim with provisions and household furniture was not inconsistent with his knowledge of him, "but does not think he could have spent half his time a day at a time on the claim without my knowledge of it."

Folio 17, 18, and 1st of 19: Mr. Hanzleman testifies he spent a part of his time during this period away from Tacoma two or three times a week buying cattle.

Folio 36: "Carr might have been gone two weeks at a time; I did not watch him; will not swear, but he might have been away a month at a time in last six months."

Folio 38 and 39: Mr. Bottsford, "he might have been away every day in the week for a portion of the time (6 months before contest) and I not know it and on his claim. I was under the impression that he was on his claim from what he told me. I have seen him with his hoe and spade and frequently with his gun. He might at various times have slept on his claim, taking provisions and bedding and his wife and child."

Folio 47: "He might have spent four and a half months of the last six on his claim."

Folio 48, 1st part: "In all my testimony I make a distinction between legal and actual residence."

236 Folio 51, middle of: "Agreeably with my knowledge he might have spent five or six nights out of the seven on the claim in the four and a half months referred to."

Folio 52, 1st part:

"Agreeably with my knowledge they (Carr, wife, and child) might have spent one-half or two-thirds of the time on the claim."

Folio 52, latter part: Contestant and claimant agree the claim is heavily timbered with dense undergrowth.

Folio 62, 1st part:
" 96, 1st "

Mr. Carr is the only witness who testifies to the character of the soil, describes it as very poor, and to a large extent unfit for cultivation.

Folio 98, 1st part; folio 117, last part:

Mr. Carr is a poor man, compelled to work away from the claim for the support of his family and to defray the cost of the improvements he made. This is his testimony; contestant does not question it.

Folio 96: "Aside from shaving shingles and selling them I know of nothing I could do to make any part of my living from the claim for the first two years after I took it."

Folio 96: Carr is not a strong man, unable to do heavy work from the effects of a wound received in battle during the "war of the rebellion."

237 Folio 95, middle of: His wife was an invalid, under medical treatment much of time since taking claim, with a babe of tender age; much of the time the wife could not be kept on the claim away from the village.

Folio 97: Mr. Carr's financial condition and the physical condition of himself and wife are not questioned, though most of contestant's witnesses have known them for years.

We site all these circumstances in connection with the testimony of the four witnesses on abandonment to show their entire harmony with Mr. Carr's testimony of residence in good faith on the claim and his denial of abandonment. All concur as to the character of the surrounding country. Contestant's witness, Hanzleman, says, "It was one unbroken wilderness for three miles."

Folio 34, last of: This explains Carr's frequent appearance at Tacoma, the village two miles distant; here only he found society; here his relations resided; here he went with his wife in her sickness; here he left her when unable to be upon the homestead; here all the business was transacted; here he purchased supplies for his claim; here was the only place he could go to get work as a photographer or do odd jobs to earn a living for himself and a helpless family and to maintain them while he was improving the claim; every day he might have been in the village of Tacoma consistently with good faith in his residence upon the claim. Now,

238 then, with Mr. Carr's testimony that he did so reside upon the claim, staying there day and night, and instancing from 100 to 200 different days spent there at labor, can it be found that he never had an actual or constructive residence upon the claim?

The rational and inevitable conclusion must be that he made honest compliance with requirements of the homestead act in respect to residence.

This law is formed in a generous spirit to meet the condition of such settlers. It even expressly provides that he may go forth if he return within six months, the law recognizing the fact, founded on universal experience, that the poor (and especially on a frontier without neighbors) must seek for employment away from their homes, and that the man without money who takes a homestead claim is in this situation until such time as that claim affords returns to labor. If such be not the genius of that act, then indeed are Mr. Carr's poverty and his unfortunate family condition his mortal foes, standing at the threshold of his Government's bounty and with jeering, mocking, saying, Though you have spent your little means and borne all the little hardships of a rugged frontier life upon this claim, and though the fresh vigor of your manhood has been spent in this Government's military service, and though in your enfeebled body you carry the infallible proof of your patriotic devotion, yet through this gateway that invites you hither you cannot pass; the wealthy have admission here and not the poor.

239 Acquired wealth would have been indispensable to have enabled Mr. Carr to have taken this claim differently. This disposes of the question of alleged abandonment, the only one Mr. Carr is required to respond to. See original notice attached to testimony. The finding is that Carr did not wholly abandon the claim.

Opinion, pages 6 and 7:

On different grounds an adverse finding is rendered. Of those issues Mr. Carr remained ignorant until the time of trial, when they were thrust upon him, such as improvements and the character thereof, the unlawful cutting of timber, the extent thereof and the motives therefor, and was compelled to resist the same by such testimony as chanced to be at hand, which in order will be received.

Next a finding is made relative to the road, "the existence of which seems dubious," but admitting it to have been made, continues the opinion, "it must have been built only during the claimed occupancy of the premises, and claimant does not show it to have been used sufficient to entitle it to be considered a valuable improvement."

Opinion, pages 3 and 4:

If built it must have been at the cost of from $40 to $60, as the witnesses testify. Was there such a road?

Contestant says not, the opinion finding that two witnesses swear positively it was not.

240 Opinion, page 3, last of:

To know of the road's existence was only an incident, while other objects were chiefly before them, while the testimony of claimant shows its existence to be a matter of personal knowledge and experience with each of them, and four speak respecting it. A. Carr says: "I cut a wagon road from 400 to 600 yards between ¼ and ½ of mile from the country road to where my house is from 8 to 15 feet wide; was over a week cutting that road."

Evidence, folio 78, last of 72; folio 79, first of:

Says Job Carr: "We traveled to the house on the claim over the road we had built."

Folio 168, middle of:

"I helped build this road three different days."

Folio 169, last of:

"I consider this road better than the average of woods roads."

Folio 172, first of:

"It's a better road than any I know of around there."

Folio 144, first of:

Says A. M. Mahon: "The road could not have — made for less than $50 to $60;" "that he worked upon and hauled lumber with a two-horse wagon over it four or five days."

Folio 145: Geo. W. Byrd says he traveled into the house upon this road and went out by same; thinks it nearly a ½ mile long. He says it's a road running through heavy timber. "It is
241 a passable road. I can drive a wagon in and out that road; I thought at the time it was a very good road." I thought at the time it was a very good road.

Folio 163, last of, and 137, first of:

But the fact of this house of sawed materials standing in that dense wilderness of timber is of itself proof of the existence of a road leading to it, for, says Hanzleman, contestant's own witness, "I don't believe the lumber could have been drawn in there without a road; it would have been impossible to have handled that lumber in there with a two-horse wagon without a road of some king having been made, at least in that woods; it is a very wild place; there were logs down every twenty steps."

Folio 130, middle of:

The opinion itself concedes that the presence of the house can only be accounted for in one of three ways:

1st. That there is a road.

2nd. By driving a wagon around logs and trees.

3rd. Taking material in by hand.

The above evidence of Hanzleman and other witnesses furnishes

a complete answer to the second hypothesis, while its inherent weakness and unreasonableness refutes the 3rd.

"It must have been built early during the occupancy," says the opinion, and "not used sufficient to entitle it to be considered a valuable improvement." The evidence is that it was built early, as of necessity it must have been to have afforded a way to the
242 claim. But why should that fact cast prejudice upon it in the estimation of the local land officers "and not used sufficient, &c."? It was used for all purposes for which such a road could be placed, viz., hauling materials for the building of the house and as a way to pass in and out upon; that only foot travelers used it after the house material had been hauled in is explained by the fact that Mr. Carr is a poor man and not the owner of a team. With respect we submit that such specious deductions are entitled to small respect when their effect is to rob a poor man of the fruit of his toil and cast reproach upon his testimony.

Next says the opinion: "Certain other improvements are alleged, the clearing of a small place and planting of some few fruit trees," but admits a person might pass right through and not see any improvements."

What the claimant did say is but partially stated and so distorted by a system of emphasis that meaning is given not sanctioned by the true meaning of the testimony.

What does Mr. Carr say relative to that matter? "I worked at this clearing—I can't give the exact number of days—from 8 to 10, perhaps 2 weeks; worked there over a week. I am certain my father worked here with me."

Folio 71:

"I began and partly built a small cabin here. I also cut a
243 part of a road."

Folio 72:

"I set out some fruit trees—from 20 to 30 small fruit trees; could not have been less than 25; might have been 35."

Folio 74:

"Tore down the cabin to build a plank house."

Folio 74, last of:

"I abandoned this place because I had a large hill to go up and come down in getting to and from it."

Folio 74, last of:

"At this locality the ferns grow very rapidly and very large." Folio 75, middle of: Sproul himself testifying that the growth is about 7 feet.

Folio 62, middle of:

"State, in your opinion, how near a man might pass directly

through it and not notice it on account of the fern and undergrowth."

Folio 75, latter part:

Thus it appears the party made a small clearing, began a cabin, took it down, planted some small fruit trees, and, on account of a bad hill, abandoned this locality as a building spot. The growth of ferns and other vegetation was such that in near 2 years one casually passing over this place might have not have noticed the improvement that had been made.

Now, when fairly seen, what is there in this circumstance or statement respecting it at variance with good faith?

244 Again, relative to the planting of potatoes, says this opinion, "he admits it was on very poor ground, where nothing could grow, and was done to prove up on his claim."

Opinion, page 4, latter part:

This imputed admission is not justified by the witnesse's testimony.

Speaking of the general character of the claim in connection with the potatoes, he says: "The ground is generally sandy and rocky and would not pay for cultivation."

Folio 89, first of:

"Why did you plant your potatoes on poor, stony ground that would not grow them?"

"There was no good ground on the claim that I know of."

Folio 117, latter part:

"What did you plant those potatoes for?"

"For the purpose of cultivation."

"Was that purpose of cultivation to raise a crop or prove your claim in the land office?" "Both."

Folio 118:

Had any settler answered this question differently he would not have spoken the entire truth, because every *bona fide* homestead settler plants his crops with the intent to cultivate his land and for the purpose of bringing proof to the Government that he is acting in good faith, for otherwise his *bona fide* toil might fail of recognition.

245 The witnesse's statement is frank and honorable; as perverted in the opinion it is *mala fide*.

So in relation to grass seed. During last winter and until April or May Carr kept a cook stove in the house, when it was removed. Opinion, p. 6, latter part: This was done in view of building a fireplace at this junction between the removing of stove in April or May and the inception of this contest and following the robbery of the house.

Folio 89, latter part:
" 90, first of:

When claimant on going away was compelled to hide away his household effects and tools as protection from thieves, and when Mr. Carr had removed some boards from the end of the house (see folio 92, latter part of) for the building of the chimney, contestant Sproule for the first time, while searching for land near what then gave promise of becoming the site of a great city, comes on this claim and with his witnesses makes examination of the house and from its then undone condition seeks to leave an impression of it that may prove bad faith on the part of Mr. Carr. The half-inch cracks are caused by seasoning of the timber; which was green boards; the 8-inch cracks by the removal of boards for the building of the chimney. Says Mr. Carr, " I had the house closed in tight at first. I removed those boards to put in a fire-place."

Folio 92, latter part:

Materials for bottom had been placed on ground long before, but were put on house about time of filing notice of contest.

246 Folio 83, last of; folio 84, first of:

So the stone for completion of chimney had been gathered and placed in easy access before the filing of contest.

Folio 86:

No witness is offered to show the condition of the house from the time of its building to the time of contest except at this particular juncture and in this undone state; Spoul never saw claim until June 1st. Steele says his examinations of it were within six weeks of trial.

Hangleman was taken there by Spoul. All of these concede it to be such as common observation will prove to be superior to the houses of the majority of claimants who prove up before this land office, while the *pore* particular and detailed description of the parties who built it show it to be a good, substantial farm-house, far better than most claimants can afford to possess during their first year on claims that require labor and time to get in a condition of productiveness. We get some idea of cost of the house when we refer to the evidence. Mr. Mahon says, " I don't think I hauled less than from 500 to 700 feet at a load; this was with a two-horse team."

Folio 143, middle of; folio 145, middle of:

Job Carr says: I helped build the house; it is a plank house 14 by 18 feet, about a 9-foot story, with frame rafters and shaved-
247 shingle roof, one door of dressed lumber—what we call a batton door—one 12-light window, 9 by 13 glass, and altogether a comfortable house to live in for a claim-house. I have seen many claim-houses and it is 25 per cent. better than the average claim-houses through the country." It is worth not less under the circumstances than one hundred dollars.

Folio- 162 and 163:

A. Carr as to same, folio 82, middle of, folio 83.

Here we have the actual description of the house by those who furnished the materials and constructed it, while much of the testimony offered in contradiction of it is of such kind as the following:

M. C. Simmons: "I don't recollect seeing any other improvements than the house." "I went to the house; stepped in; did not take any particular notice of it so I could describe it," &c.

Folio 24, first of:

Phillips Hangleman says: "I did not examine the house carefully. I did not measure the house; I paid little attention to it."

Folio 32, middle of:

Finally the decision states "that the evidence adduced shows claimant allowed Cilly to enter upon the claim, construct a regular logging road, and cut over a large space of ground, taking trees fit for lumber and leaving the 'couchus' or defective ones," and that notwithstanding claimant was not a settler in good faith, &c.

248 See opinion, page 6:

We have noticed all charges of bad faith aside from cutting timber. Let us now look to that; what is the evidence respecting it?

Mr. Simmons, the only witness for contestant except himself respecting the matter, says, "I went to see him, Mr. Carr, and asked him about the timber;" he said he owned the place as a homestead and didn't think he had the right to sell the timber; then I spoke and said, I had seen a piece in the paper stating that a man could log off land he wanted to clear up; he said he believed he recollected seeing the same, and if I wanted the timber (after studying over it awhile) I could have it for fifty cents a thousand, as he wanted to clear the land up. "We went in there on the understanding I have spoken of—that I was to have the timber at 50 cts., as he wanted to clear the land up."

Folio 21:

"There were two or three men besides myself heard the bargain in at Miller's store at Tacoma; the clerk of the store was one, the others I have forgotten."

Folio 22, near first of:

"I quit—turned over the camp to a man by name of Watts Cilly; I took him down to Carr's and had him understand the contract the same as we had it;" the date I left was last of March or 1st of April.

249 Folio 22, latter part:

Mr. Carr says so far as it goes Mr. Simmons' testimony respecting the timber is correct: "I would not sell it to him. I did not think

I had a right to sell, and told him so, and he referred to an article in the newspapers which I had seen."

"I had started in to slash and burn a piece of swale—good timber, principally—and I did not see the difference whether I got the benefit from the timber or destroyed it by fire, and told him if I was certain that I was not transgressing the law that he might cut and remove such timber as he wished; to take off a specified piece. The balance I would slash and burn to clear it, as I was bound to slash and clear the land."

Folio 98:

"Did you show him the land?"

"I did; partly by the land and partly by a map."

"About how large and what kind of a tract was it?"

"I think it embraces some 10 or 15 acres that I intended cl-aring; a clayey swale; a piece of upland ground; the largest piece of clay I knew of on the ground."

Folio 99:

"I told him not to cut except on that forty (where the 10 or 15 acre tract was). I told him I would rather he would wait until I had proved up; till my time was out—the 28th of June—and not
250 cut any till then. It was my express understanding that he should stop instantly when I told him to and he agreed to."

Folio 100:

"Was it a part of the agreement that he was to give you any assistance in clearing that land? If so, state what."

"It was nothing definite: only in general terms that such logs as I could not handle easily or burn where they were he was to take the oxen and roll for me."

"By REGISTER: Before you made the agreement with Mr. Cilly about logging, did you ask for or obtain any official information as to your rights to do so?"

"I asked a lawyer in Steilacoom, and he told me I could; his name is Jacob Hoover."

Folio 119, last of, and 120:

"State, to the best of your knowledge, how much land in area has been burned over."

"Don't think it's more than seven or eight acres, possibly 10."

Folio 101:

"It was my intention to clear this land. I had started in to work on it; to cut and burn; he run his log road over where I had been at work."

Folio 102, first of:

"Every stick cut is an advantage towards clearing it for cultivation; the claim is not injured, but benefited, by the cutting."

251 Folio 103, latter part:

"For the purpose of agriculture the claim is worth from $250 to $300; more without that timber than with it."

Folio 103:

Contestant's own witness, as above seen, failing to impugn the good faith of Mr. Carr relative to the cutting of timber, but in all things confirming his good faith, and finding no one who will do this foul deed, takes the stand and, with the recklessness of a desperate and irresponsible man, attempted the task himself. A remarkable feature here shows itself, and that is this: Spoule takes numerous persons on the claim for witnesses, even going to Tacoma for a part, that by the appearance it presented he might show Carr's bad faith, and yet, with this great belt of plundered timber there, an invincible proof of perfidy, he takes no witness to view it. He takes Steele and Hangleman and Simmons to the house, but makes no intimation of trespass; that, he says, is matter of common talk. He actually absents himself from the place of trial and travels all the way to Tacoma, 30 miles, takes a man to examine the claim, having heard Mr. Carr's evidence, and yet never elicits one word of all this list of witnesses relative to a matter vital to his case and, if existing, challenging attention (as he alleges), easy of absolute proof.

Now, Sproul seeks to magnify the cutting *og* timber by
252 giving the maximum measures to all timber he could find to have been cut, whether saw timber or mere saplings. He says, *says* by relying on his counting of the trees as the basis of measurement, admitting he might have counted some (of which, from the general tenor of his evidence, there can be little doubt), and by measuring close and counting trees from six inches in diameter, there might have been from 700 to 800 trees, or 660,000 feet; possibly 700,000 feet.

His evidence is as follows: I think if it was measured up close it would reach 650,000 feet, board measure; it might reach 700,000; from counting trees that were fallen and judging from the stumps and taging the general average size of trees. I might have missed some or counted some twice; I counted about 700—between 700 & 800 trees; that included all sizes, from six inches through upwards.

Folio 56, last of, & 57:

"I am certain it was cut for the purposes of speculation; the poor trees were left standing."

Folio 67, last of:

"What means have you of knowing that timber was cut for speculation?"

"Mr. Cilly told me that Smith and Renton were logging it off for their mill at 50 cts. a thousand feet. The citizens of Tacoma told me the same thing; I can't say I have any information than that. All my knowledge of the fact is based on hearsay."

253 Folio 68:

I went over the ground and found the best of the timber had been culled out and left the "couchus" and defective ones standing."

Folio 69:

He testifies he first came to the county where the land lies about 6 days before filing of contest.

Folio 200:

Now, it is plain the only evidence in this case to show bad faith in cutting timber is, in the opinion of the claim-jumper Sproule, based on the fact that he was told that Mr. Carr had received fifty cents a thousand for it. Upon this mere opinion of a man ignorant of the facts of the case and actuated by the covetous desire to rob Mr. Carr of his possession and in direct conflict with the unmistakable showing of good faith by his own witness and Carr's own testimony to that effect, the land officers say the evidence adduced shows bad faith on the part of claimant in cutting of timber. Remove all testimony from the case save contestant's and then we hold the finding is not a reasonable one, for it would show a cutting over of about one-fifth of the claim at a time when a claimant and not the Government had an interest in that timber. A few weeks and Mr. Carr's 3 years of military service added to his two years of residence and cultivation would divest the Government of title and
254 transfer it to Carr, and injury or trespass to the realty would be Mr. Carr's loss. Had it been in the first few weeks of the settler's residence and not in the last few of his five years that he cut timber, a different case might present itself; and even in that case the number of acres would not be the criterion of judgment, but the intent of the party, for we find nothing in the law to prevent a man from cutting all the timber from his claim if he do it in good faith for the purpose of clearing it, and would law or common sense or public policy require that he should burn and destroy rather than select and let it add to the wealth and advantage of the community? Mr. Carr testifies the area cut over could not exceed 10 acres; that the reason for cutting it was to clear a spot of clay land for cultivation, the largest and best the claim afforded; that he would not act, even in cutting so small an area, until he had confirmed his information from Mr. Simmons and the newspapers as to his right so to do—until he had received the opinion of an attorney relative thereto. But we hold that the question of unlawfully cutting timber could not come before the register and receiver at all, though it seems the essential ground of bad faith upon which their recommendation of cancellation is rested. Their province is to determine the proper questions under the homestead acts of "actual change of residence" or "abandonment for six months." Now,
255 the cutting of timber is a penal offense against the laws and dignity of the United States, punishable with fine and imprisonment and not with forfeiture. It must be determined by a

jury of the country under the instructions of the court. The utmost that could be claimed by contestant would be the light it might cast upon the subject of "change of residence" or abandonment after 6 months. Now, it is plain it has no relevancy whatever to either. In no manner can the local office adjudicate the matter of guilt in such a case and inflict any punishment, much less that of forfeiture, which the law has not prescribed. A conviction of this offense could not bring greater punishment than fine or imprisonment. It would not work as a disqualification in taking a homestead claim. If so it would inflict greater punishment upon the settler than *than* upon other trespassers, which would be abhorrent to the law. Though a settler should be convicted by the proper tribunal of this offense, and afterwards appear at the local land office making abundant proof of actual residence and cultivation in accordance with the law, is it for a moment supposed such office could refuse to accept his proof or the Government to withhold title? The duty of the local office is plain, not to sit as a court in judgment upon this charge of cutting timber, but to make report of it to the proper United States courts, and there their duty ends. We may be pardoned if
256 we depart from the record to say that it is a matter of public notoriety that such duty was discharged, and equal notoriety that the grand jury saw fit — ignore the charge. After this examination of the evidence we think we are justified in saying that the local office imposes a great hardship on Mr. Carr by its decision for which no adequate reason can be deduced from the testimony.

We think we can see the causes of this hardship in, 1st, a manifest misconception of the true meaning and bearing of the evidence; 2nd, in rulings that are unequal and inequitable in their operations, and, 3rd, in a clear misconception of the whole case and its proper methods. As an instance of the first-named cause, we cite the portion of the decision that says "there seems to be a recognized existence of a special feature in making and holding claims, which is here called 'claim-house,' 'claim road,' and, in general, 'claim improvements,' showing clearly the want of good faith." This language is certainly free from ambiguity, but, to indicate the special importance attached to it, is italicized and underscored, and is given also as the language of Mr. Carr and his witnesses. We feel safe in saying that, of all those words so obnoxious to the office, the words 'claim-house' alone were used. Job Carr is the witness who uses them, and in answer to a question as to what he meant by the words "under the circumstances of a claim-house in the woods," he says, "I
257 mean that in building claim-houses it is always under greater difficulties than building houses on public roads or in town; costs more to get the materials on the ground and to get back and forth to do the labor (see testimony, page 176; also page 162 on the same subject). We can see no special feature recognized in that language other than that of ordinary reason, candor, and common sense. The obnoxious sense given in the decision is wholly without sanction in the words as used by the witness and in direct opposition thereto. Of course, as a conclusion to support bad faith, it is only worthless, its premises being entirely untrue in fact; as an

indication of the methods used by the office, its only effect can be to show that the office wholly failed to comprehend the evidence to which it relates concerning the most vital point of the case and raises a probability of unpleasant strength that like failure characterizes the decision on other points, as we think is manifestly true. Again, we feel confident in the statement that the evidence cannot possibly fail to show the existence of a road of some character from the county road to the house. The necessity is admitted by every witness expressly. Mr. Chapman alone ventured the hypothesis of the lumber having been hauled in without a road, but expressly withdrew it as being impossible. Page 194.

Every witness swears to the dense growth of timber on the line of the alleged road. Two witnesses who looked for the
258 road say they failed to find it. On the other hand, Mr. A. P. Carr, Job Carr, and Mahon say that they built the road. Mahon hauled the materials of the house over it. Mr. Carr traveled it whenever he went to and from his claim. Mr. G. W. Byrd says he walked over it once to and from the house since the 6th of June, 1873, with no inconvenience. They all describe it as a good woods road. Better far than the average. The local office, under the light afforded by this testimony, find either that there is no road or that "its existence is dubious," contradicting what all admit to be a necessity and rejecting the evidence of four witnesses who swear to the details of their knowledge for that of two witnesses who simply say that they saw no road, admitting in the same breath that there must have been one. The only reason for such a finding as the second discloses is the possible implication that the two witnesses are alone worthy of belief, their testimony, in the language of the decision, "not being impeached." We should not be willing to charge the decision with so invidious a distinction as that, for surely it cannot be meant thereby that these four were impeached, or indeed any in the case. The only theory, however, on this point, if we would avoid such a conclusion, is that the office misconceives the evidence, and this is the fact, we think. Again we call attention briefly to the portion of the decision that finds bad
259 faith in the fact that Mr. Carr sold a portion of his timber for logging purposes, as the evidence on that point has already been largely reproduced in this brief. We only say that it furnishes another instance of a discrimination against Mr. Carr for which no reason appears or is assignable in the evidence. Clearly the testimony of Mr. Carr and that of Mr. Simmons showing good faith is rejected entirely, and the use of the expressions "couchus," trees left standing, "culling out," "regular logging road," and others we might cite show clearly that the testimony of the contestant himself, uncorroborated either by other testimony or fact found, furnished the sole text of the decision in this branch of the case. These expressions, used as they are, show clearly a misapprehension of the true bearing of the testimony on this point. All the testimony admits the timber to have been sold for logging purposes to a logging company. Granting that it is within the comprehension of all that the "regular logging road" and the leaving of "couchus trees"

must follow as necessary concomitants, anything different would be inconsistent with all known methods of taking timber for lumbering purposes. As lesser instances of the same thing, we call to mind that the decision leaves an impression that Mahon and Byrd were both brothers-in-law of Mr. Carr, the evidence showing Mahon alone so related.

The decision shows Mr. Carr admits that he slept on the —
260 but two or three times during the six months next before the contest. The evidence says from 15 to 25 times, and not less than 15 times. See page 88, 1st part, & page 87, last part of.

The decision says he admits the planting of potatoes on poor soil, and that it was solely to prove his claim in the land office. The answer is to a question as to whether it was for the purpose of cultivation or to prove his claim in the land office, and he says that he had both ends in view, and that there was no good land on the claim for grain or vegetables. See testimony.

Pages 119 and 117:

An answer of sufficient good sense and candor to shield it from an imputation of bad faith, we think. The decision says the road is the main improvement claimed. The evidence places it less than one-third the value of the house and clearing adjacent, not more than two-thirds that of the second clearing, and not much, if any, more than that of the first clearing.

The decision infers that the clearing of old road was the main part and the cutting of new the lesser. The evidence is that the cutting was double the length of the clearing, and that it was through very heavy timber. The hypothesis made to account for the house without the road, to wit, the hauling around through the timber by carefully driving over one of the ridges or the carrying of the material in by hand, go a full length beyond any evidence
261 to be found in the case. The former was expressly withdrawn by the only witness who suggested it as impossible, and the latter too chimerical for notice at all. We cite these as manifest instances of the manifest misunderstanding of the true bearing of the evidence, and as indicating by their frequency that the methods of the decision were mistaken throughout. They indicate more than this, however. They show a reluctance to credit the testimony of Mr. Carr or any evidence in his favor that must of necessity prove fatal to his claim. We willingly concede it as the judicial privilege and duty of the office to make its own proper discrimination in the degree of credit to be attached to the statements of different witnesses, but we feel bound to enter our earnest protest against the wholesale rejection of the testimony and evidence in favor of Mr. Carr, unless some adequate reason can be found therefore in the testimony, and we say no such reason can be found therein.

Second. We think that a grave hardship is imposed on Mr. Carr by rulings of the office which are incorrect, because unequal and inequitable in their operations. By the ruling made in the case of the witness Byrd Mr. Carr was rigidly denied the benefit of all ob-

servations made by that witness and others subsequent to June 6th, 1873, though only six weeks had elapsed since that time.

We admit the propriety of the ruling under its proper
262 limitations, which can easily be seen. The rule, however, was practically withdrawn in behalf of the contestant, as will clearly be seen. It hardly can be possible but that the great bulk of contestant's evidence is based on observations made subsequent to June 6th, 1873. The observations of H. N. Steele were confined mainly to the previous six weeks and specially to the two weeks previous to trial (page 7). Mr. Chapman never visited the claim until the trial was nearly concluded. Mr. Sproul never saw it till June 1st, and, being there almost continuously till the trial, it is hardly probable that his main observations were made in the first few days of that six weeks. The same is true of Phillip Hangleman, who was taken to the claim by Mr. Sproul. In fact it is clear that almost the entire bulk of contestant's testimony relates to observations made not prior to June 6th, 1873.

Thirdly. Mr. Carr is prejudiced in a great degree by what seems to be a radical misconception of the nature of the whole case and the methods of proof required. The notice given him by the office is a notice of contest on the charge of abandonment. His attention is directed to that alone. On the trial he is compelled to make as full a showing as if he were seeking to make his final proof.

This issue of abandonment, to which alone his preparation is directed, is found in his favor, and afterwards a recommendation is made that his entry be cancelled upon grounds to which his attention was not called.

263 Furthermore, he is placed in the position of one bringing and not defending an issue.

The presumptions are all clearly made against him, and he is made to bear the burden of proof throughout.

This theory only is consistent with the rationale of the discussion. All of these matters were brought prominently in view both in the conduct of the trial and the argument of counsel. We make the objections only after a careful review of the entire testimony, and for their validity and weight we confidently appeal to the testimony.

We think that the recommendation made by the office finds no justification in the evidence when properly interpreted and construed, and we feel bound to enter our protest against it as working a grave and unwarrantable hardship.

In conclusion we desire briefly to call the attention of the general office to some of the equitable considerations that plead strongly against the hardships of this decision. Unless Mr. Carr's testimony is disbelieved entirely and much of the testimony of other witnesses, he has identified himself with his claim by all the circumstances of toil and hardship and expense that are the best evidences of good faith and furnish the strongest claim to the equitable consideration of the law. He has spent as much as two hundred days or parts of days in working on it. He has made improvements under
264 the most adverse circumstances, which cannot be worth less

than three hundred dollars, more reasonably four hundred. He has very frequently slept and eaten on his claim. He has had his family there as much as their impaired health and his circumstances would allow. He is an actual settler by every reasonable and proper intendment of the law, if compliance with its provisions is to be inferred from the foregoing circumstances. We venture that the records of the local land office will not show a fuller compliance with the law by one homestead settler in ten who have successfully made final proof before it. This has been done in two years instead of five.

To do it has involved the privations of a life on the frontiers of civilization. Mr. Carr doubtless has been elsewhere than on the claim, engaged otherwise than in its cultivation, but an explanation is furnished in the barren nature of the claim itself that absolutely affords no means of a living to such a system of cultivation as a poor man is able to give it; that Mr. Carr is a poor man, wholly dependent on his own exertions for support; that his wife has been under medical treatment and has been unable to bear the privations of life on a claim and has had a child of tender age during this time.

That his presence and exertions elsewhere during much of the time were absolutely indispensible to his family. The law is
265 reasonable and framed in a spirit of equity and liberality, and is certainly broad enough to admit excuses of such manifest justice and reasonableness. In fact a very distinguished former Commissioner has decided them to be quite adequate under an equitable administration of the law to excuse the total lack of residence.

See 2nd Lester's Land Laws, page 265. Furthermore, as a man who has done honorable military service in defense of his country and who bears in his enfeebled frame the evidence of his devotion to her at a time when the devotion of her citizens was her only dependence, Mr. Carr is entitled to every equitable consideration in the distribution of her bounty. He claims under a law made expressly in behalf of men who, like him, have shown their patriotic devotion by service equally patriotic.

Will the Government that owes so much and makes such a liberal promise of reward after all its privations have been endured and the hardships met lend itself to the more than fraud of giving such a construction to the conditions of that promise as to remove it practically from the ability of her citizens to realize?

We feel that no less a hardship is involved in this decision. The fact that this claim has a great prospective value as being almost within the limits of a growing city should not subject the claimant to any more rigid proofs than when it was in the wilderness with nothing whatever to give it a speculative
266 value, as was its condition till a few days only before this contest.

The circumstances which have so enhanced its value are purely fortuitous, but they alone furnish the occasion for this contest. We would be as unwilling as the local officers themselves to reduce the

just and reasonable requirements of the law, but when men of all vocations, lawyers, merchants, ministers, and artisans, can successfully meet the ends of the law and pursue their respective vocations, we do think the law is made a mockery and more than a delusion when a disabled soldier is subjected to such rigidness of proof as this decision shows, and especially when this is done upon the showing and must enure to the benefit of a man who is a claim-jumper and a speculator by his own showing and testimony.

As sustaining the view we have taken in regard to the cutting of timber by a homestead claimant before final proof made, we beg leave to refer to the recent instructions of the Hon. Commissioner on that subject, and also to the decision of the Hon. Roger S. Greene, delivered in a case involving the same matters, of which an extract is hereto attached.

J. B. ALLEN AND
J. S. ALLEN,
Attorneys for Anthony P. Carr.

267 TERRITORY OF WASHINGTON, } ss:
Second Judicial District at Vancouver, }

In the District Court, April Term, A. D. 1873.

THE U. S. }
vs.
THOMAS MONAYHAN. }

In the course of his charge to the jury Judge Greene said:

If the defendant cut the timber on land of the Government he is not necessarily, therefore, guilty of crime. He claims that he, as a *bona fide* settler on the land, had a right to cut all the timber he did cut. The law did give him the right, as such a settler, to cut timber for all necessary purposes in the course of actual *bona fide* settlement and cultivation; to clear ground enough on which to build; enough around his buildings to render them reasonably safe from fire and falling trees; enough for necessary pasture and for actual agriculture, and to cut in reasonable quantity timber for actual consumption in fuel, buildings, fencing, and other domestic uses; all this the law allowed him to do, provided his real and true intent in doing it was in good faith to settle on and cultivate the land. Whether the defendant is guilty of the crime charged or not depends, therefore, upon his settlement and his good faith.

You are to decide this case between him and the Government as men of common sence and of experience in the ways of men
268 against and the motives which actuate them. In order to convict
is disbelie you need to be well satisfied that he cut some of the tim-
he has iden se than in good faith as a settler; and you should con-
toil and ha us satisfied that he so cut any of it.
faith and fur cts in this case you can arrive at some conclusion with
of the law. defendant's acts and motives. If, as men of good
of days well persuaded that he cut timber for the purpose of
264 the most rd-wood and getting gain or for any other purpose

than honestly to bring the land under settlement and cultivation for his own use as a settler, then you must convict him.

If the timber was cut only in course of actual settlement, for ends of which the law approves, as I have indicated, the defendant is not to be found guilty because he afterward sold what he in good faith cut. It is for the common good that timber cut down should be used, rather than be wasted by fire or rot, and the law does not prohibit the sale or utilization in any way of timber rightfully severed from the soil.

If the defendant is a settler who has acted honestly in the premises, of course he ought not by your verdict to be found guilty and so branded as a knave, but if he has acted dishonestly by skinning the land of its timber he has not only robbed the common treasury,
but has taken away from the midst of us what was a standing
269 invitation to every stranger to become an honest, permanent
tax-payer and neighbor, and richly deserves all the punishment the law inflicts upon him.

No man under the false pretence that he is a *bona fide* settler can lawfully go upon Government land and cut timber off it, whether for sale or for any other purpose.

From the facts in this case you are to judge whether the defendant has done this. If he has he ought to be found guilty.

(Endorsed:) U. S. local land office, Olympia, W. T. Entry No. 1368. H'd. Robert Sproule *vs.* Anthony P. Carr. Argument on appeal to Commissioner of Gen'l Land Office in behalf of Anthony P. Carr. J. B. & J. S. Allen, attorneys for Carr.

270 UNITED STATES DISTRICT LAND OFFICE,
OLYMPIA, W. T., *Sept. 4th*, 1873.

Hon. Commissioner General Land Office, Washington, D. C.

SIR: Accompanying this we send you the papers in the case of Robert Sproul *vs.* Anthony P Carr for a*m*andonment of homestead entry No. 1368, made June 28, 1871.

These papers have been detained to give attorneys for Carr an opportunity to file an argument in their case, but, after calling their attention to the subject several times and no argument filed, we forward the papers for your action.

Very respectfully, J. T. BROWN, *Register.*
ROBERT G. STUART, *Receiver.*

(Endorsed:) U. S. district land office, Olympia, W. T., Sept. 4, 1873. K. 68006, register & receiver, "A." Forwarding papers in case of Robert Sproul *vs.* Anthony P. Carr for abandonment of homestead entry No. 1368. Ans. Oct. 16, 1873. R. Pierce. C. Sept. 17, 1873. Enclosure.

271 UNITED STATES DISTRICT LAND OFFICE,
OLYMPIA, W. T., *January* 6, 1874.

Hon. Commissioner General Land Office, Washington, D. C.

SIR: Enclosed herewith fine notice of appeal and argument filed by J. B. & J. S. Allen, attorneys for Anthony P. Carr, who appeals from your decision in case of Robert Sproul *vs.* Anthony P. Carr for abandonment of homestead entry No. 1368, June 28th, 1871, as announced in your letter "C," Oct. 16, 1873.

Very respectfully, J. T. BROWN, *Register.*
ROBERT G. STUART, *Receiver.*

(Endorsed:) U. S. district land office, Olympia, W. T., Jan'y 6, 1874. K. 84739. Register & receiver. (D.) Forwarding appeal of Anthony P. Carr from decision of Commissioner announced in letter "C," Oct. 16, 1873. 3238. R. Paid. C. Jan'y 20, '74. Enclosure.

272 TACOMA, WASHINGTON TERRITORY, *August 12th*, '73.

Hon. Willis Drummond, Commissioner General Land Office, Washington city, D. C.

SIR: I wrote you at some length the 14th of June concerning the seizure of a few thousand feet of logs I had cut on my homestead, entry No. 1368, Olympia land district, and received a reply from the General Land Office, marked "C, vol. 124, p. 184," and for the notice and reply I am very thankful and I shall crave your indulgence for just this one more intrusion on your time and attention in reference to my homestead and not the timber referred to before.

Certain parties, whose names *with* appear, have, in pure malice and with personal spite, induced a low and irresponsible wretch to contest my claim on the ground of abandonment. The testimony of the trial held before the register and receiver in Olympia, July 17, 18, and 19th, you doubtless have in your office before this reaches you.

It is to *veritate* some of these proceedings of that trial and to claim my own that I am now writing to you.

To begin with, the agents of the Northern Pacific Railroad Company here, through their subs and menials, openly claim and boast
273 that they own and control the surveyor general, the register, and receiver in Olympia, and that no one can get anything through that official fountain except such as they, the N. P. R. R., choose to let the people have. For information on that point I refer you to any good business man, who is not a railroad man, in Olympia, Seattle, or, for that matter, in the Territory.

Then, again, it is positively sure and a settled conviction that the railroad managers and land ring, I refer more particularly to Judge Rice, J. C. Ainsworth, J. W. Sprague, E. S. Smith, and their more immediate associates here, have put up this job to rob me of my homestead, whether or not right or wrong; and right here I wish you to notice particularly, if you please, the fact that I state under oath and can prove that one of their confidants boasted to me a day or two

before the trial that these men (Sprague, Smith & Co.) had counted the cost and chances before they went after my claim, and that they meant to have it at any cost or rate, and he offered to bet me $50 that (mark the language) they would beat me out of the land, not a darned bit of difference what I proved.

They were so sure of the result, for, he continued, they have millions of money and you have not a cussed dollar. This is only a small part of the conversation, but will give you an idea of the operations.

As to the men or tools they employed, the contestant, Sproul, I have been told, was a Missouri bushwhacker, is a railroad
274 employee under Sprague, and perjured himself in the sworn testimony that you have or ought to have of the trial.

He swore in his complaint that he knew me and the land for six months previously to June 6th, &c., and in his evidence swore he had been in this county only 6 days previous to the sixth of June. H. W. Steele, the principal witness in the prosecution, is a violent, rabid secessionist and a very quarrelsome man. He went to Caribou early in the late war, took the oath of allegiance to the British government, and thanked God that he was away from the damned Yankee Abolition rag, and a string of such stuff.

He is the same man who was the main cause and witness in my father's homestead contest (which was not forfeited) a couple of years ago, swore all about the claim at great length, and on cross-examination got confused, broke down, and said, "I don't know a damned thing about the claim."

My father, brother, and myself, having been Union soldiers, are special objects for his malice and hatred.

Hentselman, another of Sproule's witnesses, is a low, ignorant foreigner and a violent secessionist, and who, early in the rebellion, went to Fort Steilacoom and was advising the soldiers to secede or revolt and talking secession generally, and was arrested and confined in the guard-house three or four weeks by the officer in charge for his talk. He now owes me money for work I done
275 for him, and will not pay me. Chapman, another of Sproul's witnesses, is a notoriously violent secessionist and a bitter enemy of mine on general principals, politics particularly, and is a man who would do another a private injury, as he sought to do me in this case.

Now, as to my attention to the claim: I have done more work and built a better house on the claim and have stayed closer by it than any other claim in this region, with one exception only, and I state most positively, under oath, that I have not abandoned the claim and that I have not forfeited it, and that *that* the longest period of time I have ever been absent or ceased to work on the claim was fourteen days, and that only once since I filed my notification on the same. I am a poor man and labor for my living. The land in question being heavy timber and very dense brush undergrowth, I could not make a livelihood on the same before a vast amount of labor has been extended, and so I must do the best I can until I can prove up on it and sell the timber and clear a space of sufficient size to

enable me to live. I served nearly four years in the army as a volunteer, was twice wounded, and incurred what is vastly worse, external hemorr-oids, brought on by exposure and excessive hardships while a soldier. I have been offered a certificate of disability by U. S. inspecting surgeons, but don't want it. All I ask is a show to look out for myself.

276 One point I notice in the circular received from the General Land Office, which says the contestant in such cases must pay the expenses of the suit, which was not the case with me. I paid my own attorney, as I expected to, and the register and receiver made me pay half the expenses of the suit—some seventy-five dollars.

But I am trespassing on your time and patience, I fear. I have not the means to make a long or short, legal or formal, defence of my rights in this case, and can only claim my own and must abide your decision.

I refer you for any inquiries concerning myself which you might make or wish to make to the following gentlemen, who know me more or less intimately. I might name many others, but most probably these are sufficient: Hon. John P. C. Shanks, M. C. from Indiana; Hon. G. W. Julian, M. C., Ind.; Gen'l S. Meredith, of Indiana; Hon. D. P. Holloway, of Indiana; J. M. Blanchard, U. S. Patent Office; Col. Wm. W. Dudley, Richmond, Indiana; Hon. E. P. Ferry, governor of Washington Territory; Hon. S. Garfield, ex-M. C. and collector of customs, Wash. Ter. (Mr. Garfield knows the man Steele if you wish to hear any more of him); Hon. P. D. Moore, col. Puget Sound dist.; Hon. Elwood Evans, U. S. Centennial commissioner for this Ter.; A. J. Burr, P. M., Olympia; Geo. W. Barnes, banker, Olympia; N. Crosby, of Wells, Fargo & Co., Olympia, and any respectable man anywhere that knows me.

With many thanks for a patient hearing of the case, I am, sir,
Yours truly, A. P. CARR.

277 This is to certify that Anthony P. Carr, of Tacoma, Wash. Ter., appeared before — and maketh oath that the within-contained is true to the best of his knowledge and belief.

Sworn before me, the undersigned, a justice of the peace *this* and for county of Pierce, Terr. of Washington, this 12th day of August, 1873.

GEORGE E. ATKINSON, *J. P.*

Hearing before the register and receiver of the land office at Olympia, Washington Territory, July 17th, 1873.

ROBERT SPROULE, Contestant, *vs.* ANTHONY P. CARR, Claimant. } In the Matter of Homestead Entry No. 1368. W. ½ of N. E. ¼ & E. ½ of N. W. ¼, Sec. 8, T. 20, R. 4 E.

Pursuant to notice issued in the above-entitled matter, the parties appear with their counsel, and, the witnesses being duly sworn and examined, the following testimony is adduced:

Witnesses on behalf of contestant Sproul:

H. N. Steele, page 1–14; recalled, 12–121.
G. E. Atkinson, 15–20.
278 M. C. Simmons, 21–24.
P. Hanxelman, 25–42; recalled, 128.
C. H. Bottsford, 42–52.
Robert Sproul, 53–69.
H. T. Chapman, 178.
Geo. W. Boardman, 196.

On behalf of claimant Carr:

A. P. Carr, page 70–120; recalled, 201.
G. P. Byrd, 135.
Wm. Mahon, 142–158.
Job Carr, 159–177.
Robert Sproul (in rebuttal), 199.

Exceptions and rulings, pp. 139 & 179.

Page 1: H. N. STEELE sworn:

How long have you lived at Tacoma?
Four years.
Do you know the defendant, A. P. Carr?
I do; have known him since four years ago last February.
Where does Mr. Carr live?
In Tacoma.
Where is his home?
About two blocks or three from where I live. He first lived just two blocks from me and has moved one block further.
How long has he been living there?
Something over four years.
Do you see him frequently?
279 Yes, sir; as often as men would meet in a town like that.
Is that every day?
Almost every day.
During this four years has Mr. Carr lived anywhere else?
Not to my knowledge.
Where has he made his permanent home?
He has done business in the two houses from the time he built the first one till the present.
What is his business?
He is a photographer.
Is he engaged in any other business?
He buys and sells land like everybody else, I suppose.
Has his wife and family been living there?
Yes, sir.
During this four years, state if he has moved away from this abode; and, if so, when.
He has not been removed from there, to my knowledge, at any time.
Could he have removed for any time without your knowledge?

I don't think he could have been removed for any length of time without my knowledge.

Does Carr own these buildings?

I always understood he owned them; I don't know anything to the contrary.

Do you know the tract in controversy in sec. 8?

280 I have been over it several times.

State what improvements you found upon the land.

I went all over it for the first time to examine it about six weeks ago; have been over it hunting for four years. Ther-'s the ribs of a cabin partly finished on it. That's the only improvements I know of. There's no cultivated ground that I saw. The cabin is about 11 by 14; about 7 to 9 feet high to the plate; just common boards; no battens on it; cracks from ½ inch to 6 or 7 inches wide. There's just a start for a fireplace and an opening 28 or 30 inches just over that.

Any furniture in the-?

A bedstead or just the frame of one; no bottom boards or anything.

Describe the appearance of that fireplace.

I should judge it is built up about two feet. There's been no fire in it; no ashes in it or black on the stones.

Any lock on the door?

No, sir.

What has been done in the way of improvements around the house?

I did not see any improvements around the house. I did not see any improvements. There might have been some trees cut down, but I did not see any. There was a tree down; might have been burned down accidentally or on purpose.

281 Were there any evidences in the cabin to show that a person had ever slept there?

None whatever.

Were there any evidences in the cabin or around it to show that any one had taken a meal there?

I saw nothing to indicate it.

Cross-ex.:

What kind of a house is this you have been talking about?

Just the kind I described. It is about from 11 to 14 feet square, 7 to 9 feet from the floor to plate where the rafters set, made of rough boards nailed up, and some cracks from ½ to 7 or 8 inches wide.

Where is this house?

Close to the north line of the land claim about 23 rods from the quarter stake on the E. ½ of the N. W. ¼ of section 8.

How did you know you were on section 8?

By going to the corner and tracing the line.

When were you on there?

Ten days ago, six weeks ago, several times during that time; know that I was on section 8, for I took a compass and run the

line; coudln't say how *how* often I have been at the cabin; 3 or 4 times by myself and with others; have been there at different times of day; never have been there at night.

282 How did you come to be running the lines?

I was tracing the line to find a location for a party to locate the claim, this same claim.

Were you running the line for the party who brings this contest?

Objected to. Obj. sustained.

How wide were the cracks in this cabin?

From ½ inch to 7 or 8 inches wide.

Were there any battens on the house?

No, sir.

Any floor in the house?

No, sir.

Did you examine carefully the fireplace?

I did.

Did you examine critically if any one slept there?

I did; to see if I thought any one had slept there, and saw no evidence of any party having slept there. If a man had *spelt* there with his blankets and gone away and taken them I would have no evidence to show that. I looked carefully for other indications of its having been inhabited and saw nothing.

I walked all around the house, see no fence of any kind; the only thing I saw in the house was a tin bucket and a square bottle; don't think there was anything else in the way of utensils.

There was a shake roof on the house. I would not swear to the length of time. The tree I spoke of might have been burned down.

283 I have no means of knowing if other trees on the claim have been burned down within a year. They might have been.

What is the character of the ground where the house stands?

It is timber land.

Is the timber thick about the house?

Not very thick. It is thinner there than usual, having been burned over several years ago.

Do you know that it was from the burn several years ago or not?

I do not.

What would you consider improvements?

Building a house, chopping down timber, and burning the logs and building fences I would call improvements. It's no difference whether trees are chopped so they are cleared from the ground.

Was the door of the house open or shut when you went there?

It was open.

Do you know that Carr lives in Tacoma?

I know he has lived there as long as I have known him; that he built one house and lived in it and then built another.

I have been away from home since I have lived in Tacoma from April, 1872, till August. It was four months and ten days;

284 have not personal knowledge that Carr lived there while I

was away; have understood that he did. I have been away for three days at a time and for one day at a time.

What is your business?

I keep a hotel.

Are you accustomed to see Mr. Carr any more than any other man in the town?

I am not.

State if you have known of the whereabouts of Mr. Carr for the 6 months previous to the making of this complaint.

No, sir; I do not.

Might not Carr have been absent from town and you not known it, absent for a week?

He might or might not.

Might he have been away a month and you not know it?

I do not know.

Might Carr have been away two months and you not know it?

No, sir; he could not. I know that from my seeing him day after day, constantly.

Do you know of Carr's having abandoned this claim for six months?

I do not.

Are you on good terms with Mr. Carr?

I am.

Redirect:

State about how often you saw Mr. Carr in the last six months.

285 It would be impossible to say; we meet almost daily; perhaps a dozen times a day; he is away a day occasionally, and sometimes I am away for a day or so.

Do you recollect of Carr's being about during the last six months?

Yes; I knew of him going prospecting; he had a pack on his back; could not fix the length of his absence; if he had been away a month I could recollect it; think I would recollect if he had been absent two weeks.

State about the logging road across the claim.

Objected to. Ex. allowed

It was built by Renton, of Blakely mills, to haul logs off this land in controversy; I don't know the exact distance the logging road was on the land; from 500 to 800 yards.

Q. by REGISTER:

This is a new road; I saw them making it.

H. N. STEELE.

GEORGE E. ATKINSON sworn:

Do you know Anthony P. Carr?

Yes, sir.

Where does he live?

At Tacoma.

How long has he lived there?

I have known him to live there 3 years and a half.

How do you know of his living there?

286 Sometimes by going to his house and by his coming to the store on business; that is previous to a year back; since then I have lived neighbor to him; on the next lot to him.

State if Carr has a family.

He has a wife and one child.

Has Carr and his wife and child lived at Tacoma continuously?

I think he has; they used to go away visiting sometimes. I have understood that to be their home.

How often have you been in the habit of meeting Carr?

For the last year back; sure once a month; probably have met him a good deal oftener, but am sure of that.

Could he have broken up and gone away without your knowing it within the last year?

I think not.

Do you know what the common report is as to Carr's residence? (Withdrawn.)

Cross-ex.:

Might Carr have gone away and staid a day without your knowledge of it?

He might. I have known of him going away for a day or two; he might have gone away for two or three days and I not have known of it. I have known him to go off to the mountains two or three times in the last year; have seen him with a pack; think if he had been gone as long as a week I would have known it.

287 Do you know of his going to his claim at all?

I do not of my own knowledge. He has told me of going there. He might have gone to his claim and I not known it. He might have taken his family for two or three days and I not have known it.

Do you mean, when you say Carr lived in Tacoma, that he did not have a home elsewhere; that you know he had not?

I have always supposed that he lived in Tacoma; have visited him there and had business with him and supposed that was his home; never knew any different.

Did he ever tell you it was his home?

I can't say he did particularly.

Might Carr have taken his wife and child out to the claim and you not have known it?

He might.

Might he have taken provisions out to the claim and you not have known it?

Yes, he might; might have taken bed clothing out; do not think he could have spent half his time a day at a time on the claim without my knowing it.

How far from where you work to his claim?

I do not know where his claim is any further than I was shown

coming along the road to-day; should suppose the distance was a mile and a half to the claim I was shown.

Did he ever tell you how often he went to his claim?

No; he has talked some about his claim; about going to it.

288 By REGISTER:

What is Carr's business:

I do not know that he has any. He is generally known as a photographer; has part of his house fitted up for that; has no sign out.

Redirect:

What is your business?

Am book-keeper at Tacoma mill.

GEO. E. ATKINSON.

M. C. Simmons.

State if you *ha*ve had any transactions with Mr. Carr about this claim?

I had business with Mr. something about some timber on his place. I was running a camp for Renton, Smith & Co.; had charge of the camp. I was cruising for timber; found this timber on Carr's place. I found out who the timber belonged to and went to see him, Mr. Carr, and asked him about the timber. He said he owned the place as a homestead and didn't — he had the right to sell the timber. Then I spoke and said, I had see- a piece in the paper stating that a man could log off land he wanted to clear up. He said he believed he recollected of seeing the same and if I wanted to buy the timber (after studying over it awhile) I could have it for fifty cents a thousand, as he wanted to clear the land up. I told him I would take it provided it was agreeable to the mill company I was at work for. I went and see- Capt. Renton, and he said, Go
289 on and log off. There was two or three men besides myself heard the bargain in at Miller's store at Tacoma. The clerk of the store was one. The others I have forgotten. We went in there on the understanding I have spoken of, that I was to have the timber at 50 cts. a thousand, as he wanted to clear the land up. I went on—went to work swamping out a road. We had the road cleared out and a few skids hauled when I left, and I quit; turned over the camp to a man by the name of Walls Cilly. I took him down to Carr's and had him understand the contract same as we had it. That was the day before I left. Since I know nothing about it. The date I left was the last of March or first of April this year. The contract with Carr was about four weeks previous to my leaving.

What claim was this from which you bought the timber?

I understood it to be Anthony Carr's claim, as I found his name on my map as the owner. I could not swear to the section without looking at maps. (Map shown. Witness designates W. ½ of N. E. & E. ½ of N. W. ¼ sec. 8, t'p 20 N., R. 3 east.) I traced the line, I

think, quarter — a mile, starting at the northeast quarter of Carr's place to a half-mile stake. From there I set my compass and see that I thought it would take in the house; then went back to where I started from; took out my pocket compass and run south from N. E. corner to find out where the line would be betwixt that and another claim between that and the bay, so I would not trespass on anybody's land.

290 I don't recollect of seeing any other improvements than the house. I went to the house and stepped in; did not take any particular notice of it so I could describe it. I should think the description of the house as given by Mr. Steele is correct, only I don't think he had it quite wide enough. I should think it was 14 feet wide.

Do you know anything about the amount of timber or logs cut off that claim by your camp?

I do not.

M. C. SIMMONS.

PHILLIP HANSELMAN sworn:

Where do you live?

In Tacoma.

How long back?

Since 20th March last year.

Do you know A. P. Carr?

Yes, sir.

How well do you know him?

Pretty well; we have been neighbors some time.

Do you know where he lives?

Yes, sir.

Where?

In Tacoma.

How long has he been living there?

Before I got there and ever since I got there.

Has he a family?

291 A wife and one child.

Where do they live?

With him in Tacoma.

How far apart do you live?

It might be 300 steps.

Do you see him frequently?

We see each other very often; some days five or six times; sometimes two or three days we wouldn't see them at all. I think some time ago I didn't see him for a couple of weeks; think it was last summer about this time, possibly a little later.

How often have you seen him during the last 6 or 7 months?

I couldn't state; have seen him very often.

As often as once a month?

Oftener than that.

As often as once a week?

Yes.

Do you remember his being absent during this six months?

Not for any length of time.

Were his family absent at all during the last six months?

I never missed them.

What is your business?

I kept the butcher shop in Tacoma.

How far is that from Carr's house where he lives?

It is about 300 yards; maybe more, maybe less.

Do you live at your shop?

It is all one place.

292 What is Carr's business?

He has a photographer's gallery there in his house.

Have you ever been over Carr's claim?

I have been over it about three times; the first time the first week in August, last year.

Were there any improvements on the land then?

I didn't come across any then.

When did you next go over it?

Last fall, in August; I crossed the ground twice last fall and did not see any improvements.

When were you there again?

A month or two ago, and then I saw that house there.

Describe the house.

It was a lumber house, balloon, about 14 to 16 feet long and maybe 12 feet wide; would not state positively; that's as near as I can come to it. Had a roof; shake roof put on shingle fashion; a better roof than ordinary shake roofs. It was not completed; a floor was laid down and a chimney commenced, about two feet high. I recognized the house from its being one I saw Carr tear down on Mr. Davisson's place, and from that I knew it was Carr's claim.

When did he tear it down?

Last spring a year ago; it laid there a long time before it was moved.

How long did it lay there?

More than two months; it lay there a long time. I would not be positive about the time it was pulled down.

293 How far is the place where this house was torn from Carr's claim?

About six hundred yards in a straight line.

Any other improvements on the claim?

I didn't notice any.

Any ground dug up or cultivated?

Didn't see any, didn't notice any.

Anything to show any one had slept in the house?

Hard to tell; a man might have taken his blankets and slept there; no fire had been made in the fireplace then. It looks to me there was an old bedstead there or the frame of one.

Was there any well there?

I didn't cross any.

Was any place near by to get water?

I crossed a swale that had water, but whether any one got water I don't know. I didn't see any place made for keeping the water.

Do you know anything about the logging road from Cilly's camp across the claim?

It goes up in that direction; how near the house I don't know.

Have there been any trees taken from this claim?

There is lots of stumps to be seen from the road.

Cross-ex.:

Do you know how near to the line of Carr's claim his house is?

294 I only know it is section 8; I know the roads run through section 8, and that his house is nearest to the old road; I know the roads; both the old and new one runs through section 8. Mr. Sproule was with me when I went to — house, and a man by name of Cartner; no one else. I went there accident-ly; I did not examine the house carefully; I knew it was Davisson's house, and so I knew it was Carr's claim; I didn't measure the house; there was a door to it, a rough floor in it; it was not battened; part of it, I am satisfied, was not battened; I just noticed; I could see through and through; Cartner made fun of the chimney and the man was building it; I paid lettle attention to it.

Might you not have got your recollection of the house from what was said about it from remarks you have heard made about it?

Not a bit of it.

From appearances, might not a man have slept there every night?

I can't say about that; a man might go in there and sleep, but it did not look as though it was inhabited.

What was the character of the land about the house?

As to improvements, the land looked just as God Almighty left it; it was in its natural state; the most of it is rolling land, timber land; now and then a little swale, with hardhach on it; I

295 call it timber land; I remarked I would not like to live in the house till some of the trees were cut down; trees were standing close around the house; I could not say how many trees might reach the house; it was just like all the timber country around here; I saw one tree that was burned down; how it was burned down I don't know; I did not see any cultivated land; I did not walk all over it; I can only state what I saw when I was there in August last; I did not know *I did not know* there was any claim there; I was hunting for a road; it was all one unbroken wilderness for three miles.

Might there have been improvements when you were there the last time and you not have seen them?

That might be the case, but I did not see any clearing.

How long did you say you had lived in Tacoma?

Since March 20th, 1872.

What means have you of knowing that Carr lived in Tacoma during that time?

My shop was fronting the street. He had to pass my shop in coming and going from his house to town. There's one other way

he might have gone to town, but this is the nearest and most traveled.

Have you had any particular reason during the 6 months prior to last June to notice Carr's whereabouts?

I have had no reason to observe his movements.

Have you been there yourself all the time during that 6 months?

296 Most all the time; only when I went out buying cattle for a day or two.

Who did the buying for your shop?

Myself and boy.

Did that take you out of town more or less?

Not a great deal; the demand for beef was not very great.

How often were you away after cattle?

Two or three times a week.

Did you go away for any other purpose from Tacoma during that time?

Only once one day. I came up on the Alida and went back on her. Anthony was here at the same time.

How long at a time were you required to be away buying cattle?

I would go out in the morning and come back at night; occasionally stopped over night, but very seldom.

Did you have a claim at that time in the vicinity that required any attention?

I did, but I did not cultivate it; did not cultivate it for two years.

How often did you go to the claim?

Very seldom; sometimes once a month; sometimes once a week; sometimes twice a week; did not waste any time going there; only had business in taking cattle; sometimes sheep; was not in the habit of spending the night on it in the last 6 months; since

297 April 20th; have only been out on it once or twice.

Might not Mr. Carr have gone away from his place then for 3 days and you not have known it?

He might.

Might he not have gone away and stayed a week and you not have known it?

I might have missed him, but I would not have known where he was.

Couldn't he have been away two weeks at a time and you not have known it within the last 6 months?

I didn't miss him, but he might have been gone, because I didn't watch him.

Are you able to swear that he was not away one month at a time the last 6 months?

I won't swear to nothing of the kind.

Might he not have taken out his bed clothing and provisions to his claim and you not have known it?

He might.

Are you able to swear that he never took his wife out to his claim?

No; I'm not able to swear to anything of that kind. I never see

him there and I didn't watch him. He might have gone very often and I not know it, but if he had been so often there would be a trail beat to his house, and there's no trail leading to his house. I know that because I tried to find one. There's not a great deal of
298 undergrowth about the house; there's a good deal of pea vines and fern. A man might go to the house different ways and not make a trail.

Was not the vegetation of such a nature that it would soon cover up a trail?

No; it would not have been.

When you say he lived at Tacoma do you mean that he did not live or had a house any place else?

I don't know that he had house elsewhere.

Might he not have spent the greater part of the time the last six months on the claim?

He couldn't be in two places at once. I'm satisfied the greater part of the time he was around his house.

By REGISTER:

Is there no road or trail to the house?

I couldn't find one. I walked around the house and looked for one.

During this six months did you see his wife and child?

I did, frequently.

How large is the population of Tacoma?

Excluding the mill hands, I don't think it exceeds twenty-five people.

About how many dwelling-houses are there?

About 15 or 16; very few, anyway.

PHILLIP HANSELMAN.

299 C. H. BOTTSFORD sworn:

Where do you live?

In Tacoma; have lived there 13 months.

Do you know Mr. Carr?

Very intimately for the last 13 months.

State what you know about his residence or place of abode during that time.

He has resided at Tacoma.

State how you know that.

I have been there myself and have resided there, with an exception of three weeks within the last six months.

Have you seen Mr. Carr there during that time?

Frequently; when he has been in Tacoma almost daily.

What proportion of that thirteen months was he in Tacoma?

I should judge eleven months out of the thirteen in Tacoma.

What is your profession?

I am an attorney-at-law.

Have you had occasion to meet Carr professionally?

Not more than once or twice.

State other facts that lead you to consider Carr's residence in Tacoma.

We are on very sociate terms. I visit the house frequently, sometimes three or four times a week—what I would call intimate social terms. I know of no other reasons for noting his living there but visiting and frequently seeing him.

300 Where did Carr and his wife speak of as home when you were at the house?

I do not recollect that the subject was noted in any shape. Never heard Carr or his wife speak of any other place as home.

Cross-ex.:

State over what you mean when you say he resided in Tacoma.

Both in legality and fact, according to my interpretation of the law, he resided in Tacoma. He had his house and wife there.

Have you been at Tacoma every day for the last six months.

I was absent from the 1st to the 20th of June last.

Did you have any means of knowing where Carr was from the 1st to the 20th of June?

I saw him up the Puyallup about the 12th of June on his way to the coal mines.

Prior to that time and since the 1st of June had you any means of knowing where he was?

Only from his conversation and that of his wife.

From his own statements where did you find him to have been?

At Olympia; once or twice at Steilacoom. Several times—often have seen him passing with a hoe. He said he had been on his claim dozens of times in the last six months. Once he went

301 out with a bag, and once I went out with him a mile and a half toward his claim. He was carrying a window sash and turned off to his claim. It was a half sash—6 lights.

Might or might not Carr have been absent from Tacoma frequently a day at a time and you not know where he was?

He might; and I have frequently known him to be absent a day at a time and not know where he was.

In your opinion, might he have been away every day in the week?

He might a portion of the time and I not known it and on his claim. I was under the impression often that he was on his claim from what he told me. I have seen him with a hoe or spade, frequently with his gun. I was never on the claim.

Might Carr not at various times in the last six months have slept on his claim?

He might.

Might he not also have taken provisions and bed clothing on his claim?

He might.

And his wife and child?

Certainly.

How much time in the last six months might he have been on the claim?

He might have been there four months and a half.

Can you state an opinion from all your knowledge as to how long he was on the claim?

302 It might have been from four to six weeks; that opinion is predicated on his statements to me of the number of times he has been on the claim.

How is your house with reference to his?

It is the house he resided in before he built his present house, about a hundred yards west.

Do you have your office at your residence?

Yes, sir; and am there most of the time.

State whether in addition to the times you saw him start out he might have gone at other times.

Most undoubtedly.

Redirect:

Did Carr, to -ur knowledge, take bedding or food out on his claim?

No, sir.

Did he take his wife or child out to that claim?

Not to my knowledge.

Did you ever hear him say that he had taken food or bedding out to his claim?

I have no recollection of it, except the time he had the bag.

Any recollection of his saying that he had taken his wife out there, ever?

No, sir.

303 You stated in your direct examination that you should judge that Mr. Carr lived at Tacoma probably eleven months out of the thirteen. In your cross-examination you stated that, predicating your opinion on his own statements, he might have lived on his claim four and a half months out of the last six. Is that correct?

By living I don't mean what, in my estimation, is legally living; he might have spent as much as four and a half months there in the daytime; I do not wish to be understood that he was there as much as four months and a half night and day, residing.

Cross:

Do you not now make a distinction between legal and actual residence in all the testimony you have given?

I do, sir.

State if it is not the fact, agreeably to all you know, if he might not have lived four months and a half on his claim and you not have known it.

Not continuously.

With your knowledge of his whereabouts how many nights might he have spent on the claim?

He might have been at least five or six nights out of the seven in the four and a half months referred to.

Have you any knowledge that Carr did not take his wife and child out to the claim in the last six months?

No, sir; I have not.

How often might they have been out there consistently with your knowledge?

Probably one-half or two-thirds of the time.

C. H. BOTTSFORD.

304 ROBERT SPROUL sworn:

Do you know the land in dispute?

I do.

When did you first enter upon the land?

About the first of June last.

Did you trace out the lines?

I did.

When did you first enter upon the land?

About the 1st of June last.

Did you trace out the lines?

I did.

State what improvements you found upon the place.

I found an unfinished house about 12 by 16, about 8 feet high, the walls; one end was open, the east end; the foundation of a chimney raised about 2 feet high, no traces of ever being a fire in the fire-place or chimney; the door—there was no lock on the house, no battent whatever on the house; cracks all the way from ½ to 8 inches between the boards; the floor boards were just temporarily laid down, not nailed—that is, I couldn't see where they had been nailed; a part of a bunk, no bottom in it; I saw a little pile of lumber in the house, six-inch boards; I think there was 8 or 10 boards; might have been 12 feet long. The house was built on a little rise of ground sloping each way; no cultivation whatever about it; no trail to or from the house; no well upon the place that I
305 could find; there was a marsh that contains water about a hundred yards (might be a little less) to the east; that contains water in the winter; no place ever been excavated for a well; there was nothing to show where a man could get water at the place in the summer season; this swale is filled with decayed vegetation and grass growing in the swale; there were indications to show where a person at that house could get water. There were no other improvements I could find on the place except there might have been two or three trees chopped or burnt down close by the house. I have traversed the claim in all directions and found no improvements on the claim at any other place.

Have you been on every forty-acre tract on that claim?

I have.

State how much of the claim you have been over.

I will venture to say every five acres.

Were you looking for improvements?

I was.

Describe the logging works on the claim.

There's a logging camp situated on the bay east of this claim

about a half a mile; the road extends from that camp on the bay into section 8. It extende into the west half of N. E. ¼ of sec. 8, and branches off in several roads into the heaviest and best body of timber for logging.

State how much timber has been cut on this road on the claim.

306 I think if it was measured up close it would reach 650,000 feet, board measure; might reach 700,000.

How did you form this estamate?

From counting the trees that was fallen and judging from the stumps and taking the general average size of the trees, how many trees were cut?

I should think—I took a memorandum of it at the time. I might have missed some or counted some twice. I counted about 700, between 700 and 800 trees; that included all sizes, from six inches through upwards.

What became of the timber?

It was being hauled off to the bay and put into a boom.

State if you are a judge of timber.

I have had a good deal of experience in logging.

Have you anything further to say about the improvements?

Nothing, I believe.

Cross-ex.:

Where do you reside?

In Tacoma.

How long have you resided at Tacoma?

Since about 1st of June, 1873.

Where did you reside previously to that time?

(Objected to. Obj. sustained.) Exception taken and allowed.

Are you now willing to swear to the contents of that affidavit?

307 (Objected to. Obj. sustained. Exception taken and allowed.)

When did you go on that claim the first time?

About the 1st of June, to trace out the lines.

How did you know you were on the claim?

By the boundaries, the section stakes.

Did you look at all the section stakes?

I did; went and found 'em all on the north line.

Did you run the lines of the claim?

I did with a compass; followed the old blazes.

Did you run it with care?

I run it as minutely as a person generally can run by following the blazes and official lines as shown by the stakes; was careful to notice the lines.

Had you any particular object in visiting the claim and carefully inspecting the claim to know where the lines were?

I had.

State what it was.

It was to file on a pre-emption claim for a home on this same claim.

Did you do that at anybody's instigation?

I did not; only my own.

How many times did you cross this claim from one side to the other?

308 I have never kept a note of it, but I should think 15 or 20 times. I have traversed it in different directions to see how it laid.

What is the general character of the land—is it timber or swale?

There is some swale running north and south; then there's ridges between the swales.

In what proportion are the swales to the timber?

There seems to be very little difference. Timber grows right up through the swale. It is all timber; is heavily timbered generally.

Is there a considerable amount of undergrowth on the place?

There is in some places.

Do ferns grow pretty densely, and shrubs, and weeds, and vines?

They do; particularly on the northeast part of the claim—that is, the corner.

How high does that undergrowth usually grow?

Generally about 7 feet high.

On the 1st of June how long did you go to the claim, and how long did you stay?

I think I got on the ground about 8 o'clock in the morning; staid till about three.

What portion of the time was taken in running the lines?

Most of the time.

In traversing the claim as you speak of, what means had you of knowing you were on every five acres of it?

309 Because I know where the claim is situated and I have measured it off. It has been my business to know where it was. I have run distances north and south and took the east and west stakes for a guide.

From the growth of the timber, could there have been other improvements and you have not have seen them?

I do not think there could; there is no visible improvement except this house that is unfinished.

How much land has been logged over?

There might be 30 or 40 acres—might be more—that was cut over.

In regard to that house, did you examine it critically?

I did very carefully.

Have you stated in your direct examination all you know about the house, all you saw there?

No, sir.

State anything else that you saw.

There's a horseshoe laying behind the door; an old axe there; there was an old maul in there; a piece of an old broken saw—a cross-cut saw; there was a whetstone; there was a tin bucket, covered, hold about six quarts; there was perhaps a pound of twelve-penny

nails; there was a window stuck in on one side of the building, nailed up against the wall; two sashes, one top of the other; did not notice how many lights; there was a rough door, no lock on it; it was open; the roof was a shake roof; the shakes looked as though they had been used on another building before.

Did you take particular pains to see how many trees were
310 down about the house?

I did. I think there were three down, burnt and chopped down. There might have been four trees down. That's all the down trees about there.

What means have you of knowing there was no place to get water in summer-time?

It dries up in summer-time.

Did you look elsewhere than in the swale for water?

Yes, sir; looked all around about the place.

Might there have been other places where water could be got and you not have seen them?

It is possible there might.

On the 16th day of July, 1873, or within the last two days, in the town of Olympia, did you have any conversation with the claimant, Carr, in regard to this contest?

(Objected to. Obj. overruled.)

I did.

Where was it?

At the Tacoma house, yesterday.

On that occasion did you not state to the claimant that you were not rightly informed in regard to this matter; that you were induces by others, and if you had been rightly informed you would have taken no steps in the matter, or words to that effect?

I did not.

By REGISTER: In what shape was that timber cut—that
311 is, was it cut with reference to a clearing, or to getting the timber off?

I think the timber was cut, perhaps, for the protection of the shanty. The best timber was culled out—cut and hauled out. I am certain it was cut for purposes of speculation; the four trees were left standing.

Cross-ex.:

What means have you of knowing that that timber was cut for speculation?

Mr. Cilly told me that Smith & Renton was logging it off for their mill at 4 bits a thousand. The citizens of Tacoma told me the same thing. I can't say that I have any other information than that.

Is all your knowledge of that fact based upon hearsay?

It is.

Redirect:

State whether the appearance of the ground there, the logging

road, &c., had anything to do with forming your opinion as to whether the timber was cut for speculation.

I went over the ground and found the best of the lumber had been culled out and left the concuss and defective trees standing.

ROBERT SPROUL.

ANTHONY P. CARR sworn:

Are you the claimant in this case?

I am.

When did you make your homestead entry for this claim in dispute?

312 In the latter part of June, 1871.

Do you know its exact location?

I do, sir.

State the first improvements you made on the premises, giving the date.

I can't recall the exact day it was; just about the day I made my application. The first improvements were clearing the ground, cutting logs, rolling, cutting, and piling brush and burning.

Upon what portion of the claim was this improvement?

It was near the southeast corner.

State how many days you worked at that improvement.

I can't give exact number of days; from 8 to 10 days, perhaps 2 weeks. I worked there over a week, I am certain, at that time.

State whether anybody worked with you at that time; and, if so, who and how long.

There did; my father worked with me some three or four days. I don't recollect just the number of days. He worked there three days, and, I think, four or five.

State whether you made any other improvements.

I did. I began and partly built a small bin, and afterwards tore it down and concluded to build a plank house because a cabin was so dirty. I also cut a road, but never finished that piece; cut it about one hundred yards. I worked on the cabin about a week; about two weeks on the cabin and road together.

313 State whether any one beside your father helped you.

Not on that place.

During the time you were clearing did you sleep in the cabin and how often?

I did sleep there four or five times only. It was only two miles from town, and I could go home and stay nights and work there days.

State whether you had your family with you in that cabin and how often and how long.

I had my wife there; don't think she staid there but once or twice at that particular place. I changed my mind about that location and left it entirely; went to another place on the same claim.

State if you had your child there also.

Once only; my child was very small; not able to be taken there.

State whether you made any other improvements at that spot.

I set out some fruit trees; from 20 to 30 small trees; couldn't have been less than 25; might have been 35.

State, if you know, what the value of the improvements you made at that place at that time were.

My own work was worth twenty dollars. My father's work was worth something like eight or ten dollars. The trees could not be got short of twenty cents apiece.

State whether you continued to work there or if you abandoned that spot; and, if so, for what reason.

314 I abandoned that spot because I had a large hill to go up and down going to and from it.

What became of the cabin you built there?

I tore it down in order to put a plank house in place of it.

State how lately you were over that immediate portion of the claim.

Don't think I have been there for twelve months at that particular spot.

State whether the ferns and other growth on that place grow large.

They do, very rapidly and very large.

State how near, in your opinion, a man might pass to that improvement you were mentioning and not see it.

He might pass directly through it and not notice it on account of the fern and undergrowth.

State when you made your next improvement on the premises.

Nearer the northwest corner of the claim.

State what that improvement was.

Clearing and cutting timber and brush.

At what time?

At no particular specified times; at intervals every few days. I could not make a living on the claim; it was all heavy timber and heavy undergrowth both.

About where in the claim was this? Locate it as near as you can.

315 Without having measured from the outside lines I think it was in the northwest quarter of the claim.

State how often you have worked at that clearing—how many days.

I've worked there more than a hundred different days; couldn't tell how many.

On how many different days in the six months prior to last June?

I think not less than on twenty different days.

During that six months last referred to has anybody worked with you?

No, sir; I worked alone; I did not have money to hire anybody.

How much is the improvement on the second clearing worth?

If I had hired Indians to do the work I did it would have cost me a hundred dollars, for all I know.

How much do you consider it worth to the claim?

Not a very great deal.

State of you made any other improvements about there, as planting trees, sowing seed.

I sowed one peck of timothy seed on the ground. It probably covered four or five acres; don't think it could have been less than three acres; it might have been five.

State the next improvement you made.

I cut a wagon road from four hundred to six hundred yards—between a quarter and half a mile—a good timber road from the county road to where my house is. The logs are cut out wide
316 enough for wagons to pass most any place—from 8 to 15 feet.

I was over a week cutting that road; think I was 8 or 10 days at work on it. No one worked with me in cutting the road; I did it alone.

State if you rolled out any logs, the amount, and so on.

I did; a great many. It was ordinary timber. I rolled out some fifty or a hundred logs.

State if anybody helped you.

My father helped me and my brother-in-law. My impression is my brother-in-law took off his team and hitched onto a log. My brother-in-law used his team four or five days, not exclusively, on the road. He hauled the lumber for the house.

How much is that work worth—the clearing of that road?

My impression would be it could be worth twenty-five dollars.

Do you mean the entire work or the work you did?

The whole work done on the road.

State what other improvements, if any, you made on this claim.

I hauled lumber; had it hauled; put up a house. I did not measure the lumber; should think it was in the neighborhood of 4,000 feet. I didn't measure it.

State what was done with the lumber.

I built a house with part of it; didn't use it all; haven't yet.

What did you do with that portion you did not use?

317 It lies there yet. I intended to use it and shall do so to put on an addition.

State where you got it and what it cost.

I got it from Tacoma mill. It cost me twelve dollars and a half; has cost on the place sixteen or eighteen dollars.

What did the lumber in your house cost?

Twenty dollars besides the hauling, inspection of a pile that lies in the house. The hauling cost five or six dollars.

How much work did you do on the house?

That's difficult to tell. I worked at it at odd jobs on different days—not less than twenty, perhaps—not twenty days, but at twenty different days. Perhaps it would take me alone ten full days' work.

Did any one assist you; if so, who and how long?

My father assisted me on three or four parts of days or five. My father-in-law assisted me also.

Describe that house.

The house is a good, substantial plank house. I think it is fourteen by eighteen feet as it now stands, without the addition. 'Tis a house I tore down, bought, and moved there. It has a good, tight

floor, well laid and smooth, of inch lumber; has a good roof of shaved shingles, not shakes or clap-boards—a good roof well put on. I made the shingles—all but a few of them. I made the most of them; have made 200,000 shingles there in the woods.

318 How many shingles are there on the house?

I don't remember.

The house at present has one door and one window, both good and properly put in; the door is of dressed lumber and jointed; the window is a 12-light, 9 by 13, in good condition—a new one. The window cost $3.50 in Seattle. The house is a good, comfortable house to live in.

State if the house is battened.

It is; all 'round.

When were the battens put on?

Recently; I can't tell just when. When the house was put up it was of green lumber and was mouse-tight—so tight a mouse couldn't get in. Since then the sun may have opened the cracks, and now it is battened.

State whether the house has been battened since this contest began.

It has. I worked there occasionally just the same as though it hadn't taken place.

State how long the lumber for battens has been on the ground.

When the house was first taken there all the lumber was taken there within a few days.

State whether you placed the boards directly together when you made the house.

I did.

As originally built was it water-tight?

319 Yes; it was; would keep a storm out, would keep a person dry or dozen of 'em, as many as could get into it.

What is the house worth?

To me, under the circumstances in which I got it there, I should think it was worth to me seventy-five or a hundred dollars.

At the time the contest began what was it worth?

As much then to me as it is now.

State whether there is a chimney about the house, and describe it as — was on the 6th of June.

There was not a finished chimney; there was a stone fire-place, faced stone; good, substantial fire-place.

Had you at that time material at the house for the completion of that chimney?

Near by, not at the house, but within easy reach without hauling; part of it was there, the balance near by.

State what it was when you got it and what it was worth.

Stone; selected stone was worth the trouble of gathering it up, a day's labor, three or four or five dollars.

State whether or not you had any beds in the house.

Not a mattress. I had blankets, quilts, and pillows.

What means had you, if any, of getting your water?

There was a swale near the house that I got water for washing

and such purposes; also a spring some three or four hundred yards in another direction.

Was the spring sufficient to supply a family with water if they had been living there?

320 It never failed to supply me.

Was it a good spring?

It was.

Prior to June 6th did you sleep in the house there, and how often within the six months prior to June 6th?

I did. I can only give an approximate answer; perhaps fifteen to twenty-five times, probably not more that 25 times and not less than 15.

State what you had there to sleep on.

Blankets and quilts; two pair of double blankets and one single blanket—new blankets—one quilt, and one comforter, two feather pillows—good ones.

State where you kept them.

In the house; used 'em there and left 'em there.

State up to what time prior to June 6th you left them there.

I can't say exactly; not far from the first of May. Some one went into the house and packed them off—stole them.

State what else you had in the house prior to 6th of June.

I had a cross-cut saw and a hand saw, carpenter's plane, and a hatchet and hammer, and a frow and drawing knife and ax, good maul, iron wedge, two buckets, plates, knives and forks, stove, pot, frying pan, any quantity of nails, sometimes be a pound, sometimes ten, spade, and a hoe, mattock, lots of such rubbish.

321 State if you kept them there till what time.

Till the house was systematically went through—robbed.

State where you kept your things after that up to the 6th of June.

Some I left in the house, some I took to my house in town, some were stolen.

State whether or not you had the things you mention after the stealing in the cabin or in the brush.

I got other blankets, and after using them in the house took them off and stowed them in the brush.

Did you ever take out provisions to the house and how often?

I did quite a number of times; can't recollect how often; numerous times would express it.

How many different times did you take provisions out in the six months prior to June 6th?

More than twenty times; twenty or thirty; don't know; forty, I guess.

State if in that six months you ever cooked out there and how often.

I have almost invariably made me a pot of tea or coffee when I would be at work there.

Did you take your child out to the claim?

Yes, sir.

In regard to the road, was that a good, smooth road? And, if so, state why.

322 It was a good, smooth timber road; not like this street; a good road for a road in the timber.

Can you go directly to the house upon that road?

I hauled all the lumber that *that* is on the house and then right directly to where the house stands; had it done; helped to do it.

Did it afford a good passage to the house, so a foot passenger could go in and find it easily?

It did. I used to take my baby-carriage with my baby in it and trundle him right along to the door.

In regard to building that chimney, state if you had any board off the house; and, if so, state what.

I had the house closed in tight at first. I knocked those boards off afterwards to put in the fire-place; had a stove in there first; concluded to put in a chimney afterwards; had a stove there three or four months.

Did you ever cook other things than tea there—cook generally?

Yes, sir; I *g*ooked bread and meat there, for some things; couldn't tell what all; shot meat there in the woods and cooked and eat it in the house. I threw the bones and scraps out-doors; did not leave them on the floor.

Did you make any other improvement than that you have mentioned about the house; and, if so, what?

I did. I cut and burned down all the trees that I thought dangerous—that leaned that way and would be liable to fall on the house.

323 State the number of trees you cut and burned down there.

I don't recollect exactly; eight or a dozen, right in the vicinity of the house.

Did you do any burning of logs and brush about there? If so, how much?

I did. I think, just giving a guess at it, fifty cords of logs and brush right close to the house would be a moderate calculation.

How much time did you spend on that burning and chopping you have just mentioned?

Somewheres from 12 to 20 days, judging by the amount of work I dine.

How much did you do within the six months prior to June 6th?

From six to ten days, logs and brush burning.

What is the value of that whole improvement?

I presume one hundred and fifty dollars; don't think it could be done for less.

Are you a strong man? Can you do hard work, a great deal at a time?

I'm able to do light work; am not able to do heavy work; am not strong; was wounded in the hip during the war and have not wholly got over that.

Did you state you had been a soldier?

Yes, sir.

And taking your homestead under the soldiers' act?

Yes, sir.

324 What is the general character of that claim as to its being heavily timbered or otherwise?

'Tis all heavy timber and dense undergrowth; no prairie on it.

Would you be able to make your living on that claim?

No, sir; I could not.

What part of your living could you get off that claim within the first two years after you took it?

Aside from shaving shingles and selling them, I don't know of anything.

Are you compelled to rely on other means for your support and that of your family since you have taken this claim in a great measure?

I am *by* completely.

For the reason you could not get it off your claim?

Yes, sir.

State whether your wife is a strong woman or not.

She is not; she is — has been for three years under medical attendance; a part of the time not able to attend to her household duties.

State whether she is in a condition to go on the claim and stay on it.

She is not.

State whether you made any other improvements than those you have mentioned on the place.

325 I planted potatoes, an irregular kind of patch; four or five rods, perhaps; I didn't measure it; the ground is generally sandy and rocky and would not pay for cultivating.

State the whole matter in regard to this logging that has been mentioned.

The substance of Mr. Simmons' testimony is very good as far as it goes. He wanted to buy the timber and I would not sell it to him. I did not think I had a right to sell it and told him so, and he referred to an article in the newspaper which I had seen, the substance of which was that soldiers were to enjoy the privilege of cutting and removing timber from their homestead claims. I had started in to slash and burn a piece of swale, good timber principally, and I did not see the difference whether I got the benefit from the timber or destroyed it by fire, and I told him that if I was certain I was not transgressing the law that he might cut and remove such timber as he wished to take off — a specified price; the balance I would slash and burn to clear it, as I was bound to slash and clear the land.

State if you showed him the land.

I did—partially by the land, partially by the map.

About how large and what kind of a tract was it?

I think it embraces some ten or fifteen acres that I intended clearing. It was a clayey swale, a piece of upland ground, the largest piece of clay I know of on the ground.

326 Was anything else agreed upon at that time?

I told him I didn't want him to cut off that forty acres; not to cut over it; not to cut on any other forty.

Did you tell him not to cut on this strip of 10 or 15 acres?

No; I told him not to cut except on that forty; I told him I would rather he would not till I proved up—till my time was out—the 28th of June, and not cut any till then.

Was it or was it not understood that he should stop cutting when you required him to do so?

It was my express understanding that *h*t should stop instantly when I told him to, and he agreed to it.

Do you mean to say that you told him that?

Yes, sir; I told him that.

Was it a part of that agreement that he was to give you any assistance in clearing that land? If so, state what.

It was nothing definite; only in general terms that such logs as I couldn't handle easily or burn where they were he was to take the oxen and roll for me.

State, to the best of your knowledge, how much land in area has been logged there.

Don't think it more than 7 or 8 acres; possibly ten.

State whether it was or was not your intention to clear that piece of land you authorized him to cut from.

327 It was, I had started in to work on it; to cut and burn; he run *g*is log road over where I had been at work.

State whether these skidways have been run over any portion of land which you did not specify.

They do not. They may run over a few feet or a few rods, but the general course is where I told him to put it.

State whether this cutting is any detriment to the land for cultivation.

Every stick cut is an advantage towards clearing for cultivation. The claim is not injured but benefitted by that cutting.

How much is the value of the claim enhanced by the cutting off that timber?

I should think it would be worth $250 or $300 to cut and burn the logs.

For the purposes of agriculture, how much more is that claim worth without that timber than with it?

From $250 to $300.

State how much time since you have taken claim and up to the 6th of June have you spent in photographing?

Sometimes I would work for two or three days, and sometimes not for two or three weeks. That was my only available means of getting a living.

Does your business as a photographer keep you at your shop all the time, or a great part of the time, or not?

Trade is very tight; not much doing. I'd be there sometimes two or three days at a time, and sometimes two or three days in a month.

328 In the 6 months prior to June 6th, how much photographing did you do?

Not much; that wasn't a good time of year for business; some little, but very little.

State the greatest number of days during that time it required your attendance there.

Probably 8 or 10 days; not more than that. I could have done all that work in a week that I had to do.

Were you and your family absent from this claim for the period of six months prior to June 6th?

No, sir.

Were you ever absent, you and your family, from the claim for six consecutive months?

No, sir.

State whether you ever changed your residence from this place for six months?

No, sir.

State whether you ever abandoned this claim in dispute or not?

I did not.

Cross-ex.:

In your agreement with Simmons, did you agree that he should take all the timber that could go down that logging road that he could haul out that way, meaning all the ground tributary to that road for hauling timber?

329 No, sir; he might haul from the whole place. I don't know where he might haul from. I didn't tell him so.

Where on the claim was the first improvement you made?

It was near the southeast corner; exactly how many rods I couldn't tell; it was nearer that corner than any other.

Did you trace the line of your claim?

I did; measured it with a pole and compass.

How many rods was this clearing from the southeast corner?

I can't tell you. I never went from the corner to the clearing to find out how many rods it was.

Give the distance to the best of your judgment.

I can't tell. My impression is that father and I went to work very near the line, from six to ten rods near the south line; how far from the east line I couldn't tell.

Did you go to that place from the county road?

Yes, sir.

Describe the road that you cut from this place to the county road.

I cut logs and cut brush part of the way till I changed my *my* mind, then left it and went to another place.

Was this place within forty rods of the southeast corner?

I should judge it was. It might be more and might be less.

When did you tear the cabin down?

330 Within three or four days of the time I began to build it.

Where was the next improvement you speak of?

That was nearer the northwest corner; I never measured to find where that was, only it was inside the line.

Was that the same place where your house is now?

No, sir.

State where it is, to the best of your knowledge.

I think it is on the northwest forty; couldn't tell on what ten acres it is.

When did you sow the grass seed?

Can't give the exact date; it was perhaps ten months or a year or fifteen months ago. I don't know whether the seed came up; don't recollect that I went there for the purpose of seeing if it came up. I passed through there and noticed it in places.

You said, I don't know whether the seed came up. What did you mean by that?

What do you call a plank?

Any board, a board an inch thick, a foot wide, or any width.

Where did you get the lumber for your house?

I purchased a house for part of it and part of it at a mill.

Are you accustomed to hauling lumber?

Not to any great extent, I am sure.

331 How much lumber was in the house you purchased and tore down and moved?

I never measured it; should say in the neighborhood of 2,000 feet.

Is all that lumber used in your present house?

Yes, sir, and some besides.

Will you give the date when you brought the lumber at the Tacoma mill?

I can't call to mind when I bought that particular bill; I bought lumber there a number of times.

Whom did you buy the house of you speak of?

Mr. Davisson.

How much did it cost?

My impression is I gave him twenty dollars for it and tore it down myself.

You estimate in your testimony 4,000 feet of lumber; where is the rest?

I think there is in the neighborhood of 4,000 feet in the house and on the ground; part is on the ground to be used.

Did you ever put any lock on the door?

No, sir; never needed it.

Did you think it safe to leave a house unclosed with all those articles in it testified about?

I thought the house was away in the woods so far nobody would ever find it.

What is a faced stone?

332 A stone with a flat surface, not a round boulder. I did not mean the stones in the chimney were dressed. They were flat on the surface.

When did you build this house?

Something over a year ago. I began it—can't call to mind the exact time.

When did you finish it to a habitable state?

I think I had it enclosed, roof on and floor down, about this time a year ago.

When did you buy the house of Davisson?

It was a year ago last winter.

When did you move your stove out of the house?

I took that out some time this last spring—since the last holidays; that's as near as I can get at it.

Did your stove have pipe to it?

Yes, sir.

Did it run out through the house?

Yes, sir; through the wall, through a hole. I think the hole was where the window now is or over it or near there.

Which of the three places?

I think it went out over the window.

Are you positive it did not go out through the window?

No; it did not go out through the sash.

When did you put that window in?

The window that's there now I put in some time last fall.

333 Before what date was it you moved the stove?

It was some time in the spring; in the rainy weather. That's as near as I can fix it.

When was the last time you cooked in the house prior to the 6th of June?

That must have been some time in February or March.

Then you took the stove away in February or March?

It might have been or it might have been as late as April.

Had you a temporary fireplace outside, where you were in the habit of cooking?

I built a fire by side of a log, the way a person usually cooks out doors.

Where did you get your water when you were at the house?

In the rainy season I got it out of the swale, when it was plenty and good; in the dry season I went to the spring further on.

Had you any trail or path made to either place?

No particular trail; only such marks as a person would make going once a day or perhaps twice; didn't alway go the same way; it was all brush and logs alike.

Where did you plant those potatoes?

In the burn south of the house or southwest, perhaps.

Have you ever dug them?

No, sir.

Have you not realized considerable money before the 6th

334 of June from the sale of lots and land at Tacoma or near it?

No; I have not.

Have you sold any before?

I have sold some.

How much money have you received from the sale of land at or near Tacoma?

About five hundred dollars' worth in the aggregate; not within one year or two years or three.

What was your object in taking up the claim?

(Objected to. Obj. sustained.)

Why did you plant your potatoes on poor, stony ground that would not grow them? What do you call that ground that you agreed to have logged off?

There was no good ground on the claim, that I know of; heavy clay. It might do for grass; not for vegetables; not very good for grass.

What did you plant those potatoes for?

For the purpose of cultivation.

Was that purpose of cultivation to raise a crop or to prove your claim in the land office?

Both.

Redirect:

In speaking of this land not being good did you mean it was not good for anything or not good for raising vegetables?

It was not good for present farming purposes.

335 Through what extent of time do the transfers of land run amounting to five hundred dollars that you have spoken of?

For about six years and a half.

State if, in your opinion, a house out in the woods is not about as safe without a lock as with one.

Just as safe without a lock as with it.

Cross-ex.:

How old are you?

Thirty-two, past.

By REGISTER: Before you made the agreement with Mr. Cilly about logging, did you ask for or obtain any official information or opinion as to your right to do so?

I asked a lawyer in Steilacoom and he told me I could.

Redirect:

What was his name?

Jacob Hoover.

A. P. CARR.

H. N. STEELE recalled:

Was there any stovepipe hole through that house over or by side of the window?

I saw none.

Did you examine that part of the house?

Yes, sir; all of it.

Could there have been a stovepipe hole over that window

336 or through the house by the window without your observing it?

I don't think there could have been one.

Will you look at that diagram and say if there is any such road as shown there?

(Diagram marked Exhibit A shown to witness.)

I have been all through there many times; I have never seen any road at all in that part of the country.

State if you have ever examined particularly about the house for a road.

I have went clear round the house and saw no road at all leading to or from the house.

Have you ever seen any improvements of any kind in the places marked one and two on the diagram (Exhibit A)?

I have not.

Have you ever crossed the claim over those places?

I could not be positive that I had.

State about how your traveling over the claim has been with regard to those places.

The most of my traveling through the claim has been hunting for my cows, and there is some swale land in it, and it would run, or one would run, right in the direction of this place; then there's other swales in different places, and I have been to mostly all of these swales hunting for the cows.

337 Cross-ex.:

You say you could not be positive you had passed over the claim at the places marked one and two on the diagram?

Not at that particular point; have not passed so often over the southeast corner. I wouldn't say positively I had been over the southeast corner at all.

How often have you been over the northwest corner of the claim?

Very often. My—my cow*n* ran in there. I have never seen any road in going over that quarter of the claim. There was seldom a day that I did not go over it last spring. My attention was not particularly called to looking for a road. I was looking for the cattle. Have been there frequently during the last year; within the last two or three months. My cow had a calf in there about 25 rods from the house, and I had to pack it out over the logs.

If there had been a road in the immediate vicinity of the house would you have seen it?

I would.

Are you able to say positively that there was no road leading up to the house?

I am; there is not and I should say never has been.

Did you have your attention particularly called to see if there was a pipe-hole about the window?

I did not.

338 What time do you refer to when you say there was no pipe-hole there?

Ten or twelve days ago there was none there, certainly—that is, I saw none.

Do you refer to any other time when you say *you say* you never saw a stove-pipe hole through the house?

I never at any time saw one.

Have you been in the house every month in the last six months?
No, sir.
State what months you were in the house.
I can't state that; once within the last ten or twelve days; once, probably, two months before that. Those are the only times I was ever inside the house.
Suppose there had been a hole there previously, might it not have been filled up so that you would not see it?
If it was filled up I would not see it, for there would be no hole there.
Might there not have been a hole there up to the last of April and you not have known it?
Yes, sir; there might have been.

H. N. STEELE.

339 PHILLIP HANSELMAN recalled:

Have you ever been over the ground where the road is marked on that diagram (Exhibit A)?
I have been through the whole of section 8, from north to south, every four hundred yards, looking for an easy grade for a road from Tacoma, and if there is any road there it must be mighty dim, for I didn't see it. I don't say there is no road there, but I didn't see it. I see a road right there four years ago, that is marked here led in about 300 to 500 yards, that looked as though logs had been hauled out there.
Did you ever look for a road around Carr's house?
Only once when I was there and wanted to find a road to get away.
Did you find it?
I didn't, and I didn't look for it in the direction this is marked.
Didn't you look on all sides of the house for a road?
I think I started due north from the house. I recollect of striking this section line here; looked for a trail there the north line of section 8; saw a blaze and thought it was a blaze for a road; followed it a little ways and, finding it to be a surveyor's mark, found it was no road, so we took it straight through the timber to the county road.

Cross-ex.:

340 Could that lumber have been hauled into that house on a two-horse wagon without a road being built?
I don't believe it could be; it could not be done without a road; it would have been impossible to have hauled that lumber in there with a two-horse wagon without a roar of some kind having been made at least in that woods; it is a very wild place; there were logs down every twenty steps.
How far is it from the county road to the house on this claim on a direct line?
I think about six hundred yards to where the house is.
State whether you can make an estimate of the distance from the

point where the road turns off from the county road on the diagram to the house on the claim.

I think there would be very little difference in the distance from where the road leaves the county road and the distance given as from the nearest point on the county road in a direct line.

State, taking the necessary windings of a road through that heavy timber from the county road down to where the house is on the claim, if from 8,000 to 1-,000 yards might not be required.

I don't know the ground that road would run over and don't know the windings required for it.

Did you state in your redirect examination that you did not look for a road leading out from the house on the claim where one is marked on the diagram shown you?

341 I may have; I don't remember.

Did you not go out from the house to the north line and there look for a road?

Yes; mistook the blaze of the north line for a road. It was the only blaze I could see anywhere.

Did you look in the direction marked on that diagram for a road?

I did not trouble about it. I did not go there for that purpose. I did not pay particular attention to it, except as it was called to my attention. There were three of us, and we were all looking for a road to get out.

Did you state in your redirect examination that you had been over every four hundred yards of this section claim searching for a place for a road?

I did not say so. I said about every four hundred yards. I didn't stake it off.

When was that?

The first week in August last year.

Have you been over the same ground since the first week in August last year?

Yes; not over all of it.

Was your attention a year ago last August called to the road leading from the county road that you described as having seen four years ago?

Yes; I remember particularly of noticing it at that time.

342 Have you seen it since?

I have seen it very particularly inside of a week.

Have you traced it up within a week?

I did exactly trace it up a little ways.

How far?

Perhaps one hundred and fifty yards.

PHILLIP HANSELMAN.

G. W. BYRD sworn for claimant:

You know of this land in dispute?

Yes, sir.

Have you ever been on it?

I have been on what I supposed was the land; I did not trace the lines out.

Who were you there with?

Mr. A. P. Carr.

State by what way you went in on this land.

We went out on the county road till we came near Davisson's house, then turned to the left and went in on a road to his house.

State if the road you traveled from the county road to the house on this claim corresponded to the road marked on the diagram Exhibit A.

I should say it corresponds with the general route we traveled.

343 About what is the distance from the county road to the house on the claim by this road you have just spoken of?

I thought at the time of traveling it it was not far from half a mile.

State about what kind of a road this road is.

It's a road running through the timber, very heavy timber, passably cut out. I walked right along; didn't notice any logs across the road. The brush was cut, so I could go along the road very conveniently. It is a passable road; I can drive a wagon in and out that road. I thought at the time it was a very good road for a new road.

State whether it led you directly to the house.

It did.

State whether you traveled it more than one way.

We traveled it going in and coming out.

Would you have any difficulty in driving an ordinary two-horse team with an ordinary load from the county road to house on the claim by this road?

No serious difficulty; might have to crook around a little to get around a tree or something in case you had a long load.

Did you notice the house on this claim?

Yes; I was in the house.

State generally what kind of a house it is.

I knew nothing about previous to the 6th of June last.

344 State what kind of a roof was on this house.

Contestant, A. P. Carr, proposes to show by the witness, G. W. Byrd, the kind of house that is on the claim, especially the kind of roof upon the house as the same appeared about two weeks ago, offering to show, however, by other witnesses that the house has the same roof upon it, and that other parts of the house to which he directed the examination of the witness are just what they were prior to June 6th last, the day of filing notice of contest, said Carr offering such testimony to rebut the evidence of the contestant, Robert Sproul, and to uphold and strengthen other evidence of by said Carr and brought in controversy.

Register and receiver decline to receive further evidence not

founded on witnesse's knowledge previous to the inception of this contest.

June 6th, 1873. Exception taken and allowed.

J. T. BROWN, *Register.*
ROBERT G. STUART, *Receiver.*

From the appearance of the vegetation along and upon this road, leading from the county road to the house on the claim, could this road have been constructed or materially repaired subsequent to the 6th day of June last?

345 (Counsel for A. P. Carr requested that all questions, whether objected to or not and whether objections be sustained or not, with the answers to all such questions, be entered on the record; which request was denied, and exceptions made.)

G. W. BYRD.

WILLIAM MAHON sworn:

Do you know the land in dispute?

Yes, sir.

State if you ever went upon this land.

I did.

By what means?

The first time I was ever on the land was in hauling lumber for Mr. Carr, about a year ago. I hauled between five and six loads of lumber, hauled it with a two-horse team and wagon, a common farm wagon.

(Diagram Exhibit A shown to witness.)

State with reference to the diagram about what course you took in going from the county road with the lumber to the claim.

I think it corresponded with the route marked on the diagram.

About how far by that route is it from the county road to where you hauled that lumber?

346 I should judge a half inch, about.

Do you remember about the amount of lumber you hauled at a load?

I don't think I hauled less than from 500 to 700 feet at a load. This was with a two-horse team.

What was the character of that road?

It was a passable woods road.

How does it compare with the average roads leading in upon claims, if you know?

It's a better road than any I know of around there.

State if you saw, when you delivered this lumber upon the claim, any indication of the falling or clearing of timber?

I did.

Stat- what that was.

There was heavy trees that Mr. Carr had cut and burned.

Was this a new road at the time you hauled over it?

Yes, sir; because I helped make the road myself—part of it.

About what would you place the value of the labor in making that road?

I shouldn't do it for less than fifty or sixty dollars. I think it is worth that.

State what time you were occupied with your team in hauling the lumber and in working on this road. State also where you
347 hauled the lumber from and what that hauling was *was* worth.

I was four or five days hauling the lumber and working the road together; not less than four days; I think five. I hauled a pile of lumber from what is known as Davisson's claim, about a half mile from Carr's claim. The balance of the lumber I hauled from Carr's place in Tacoma; think I hauled two loads from Tacoma. I think I was three days hauling the lumber, and I should not haul for less than five dollars a day; that's what I got for hauling with my team.

Did you haul any shingles?

I did.

Did you have any difficulty hauling this material over this new road you have spoken of?

Yes, sir; we had some difficulty in a soft, marshy place in the road; a kind of swamp like.

State if you had any difficulty on account of the inadequacy of the road on account of logs not being cut out sufficiently wide for the wagon to pass through.

Yes, sir; we had to unhitch the team and haul some logs out of the way; after hauling the logs out of the way the road was passible.

Cross-ex.:

How long did you work on the road?

Don't think I worked less than two days on it.

Did you do that work when you were hauling in the lumber?

348 I did not do all of that when I was hauling in the lumber. I worked on the road before I hauled in the lumber. There was some of the road I had to clear before I hauled it in. Then, after hauling two loads, I had to clear the road more.

When did you do the first work on the road?

Before I hauled the lumber.

How long before?

A day before.

During that day did you haul any lumber?

I don't remember.

Did you have your team out there that day?

No, sir.

State exactly what you did on that road that day.

I can't state exactly. I helped Mr. Carr remove and chop logs that day, to the best of my knowledge.

About how far from the county road did you commence work on the new road?

I think where I had to do work was about half way between the house and the county road. It may not be half way.

Describe the road from where it leaves the county road as well as you can.

It was through heavy timber. There was no old road there. It was wide enough for me to travel over it with a wagon after
349 we had finished it. Mr. Carr had opened a road from the county road to where I helped him on the road.

How do you know Carr had opened that road from the county road to where you helped him?

Because he told me he done so.

Have you any personal knowledge that Carr opened that road to where you helped or commenced helping him do the work on it?

Yes, sir; because I saw his tools.

Did you see him at work on it?

I did not.

Could you have followed that road from the county road to where you commenced work without some one showing you the way?

Yes, sir; I could.

Had any logs been chopped out of that road?

Yes, sir; there had.

How many should you think had been chopped out?

Between twenty and thirty, I should suppose.

Any of them large logs?

Yes, sir; I should guess the largest to be two feet in diameter.

How much work would it take to chop and roll out those 20 or 30 logs?

I suppose it would take two days at the least.

What other work was done on that piece of road?

I saw some shovelling; some little knolls shovelled down
350 and also some underbrush cut down.

How recently had this work been done?

I couldn't tell that.

Are you sure that it must all have been done within a month previous to your seeing it?

I couldn't tell; it might have been two months before.

Might it not have been done four months before?

It might have been from the looks of the logs. I don't think it could have been cut that long. They looked merely chopped.

Might not that work have been done five months before?

It might.

Might not it have been done six months before?

I don't think it could; the logs looked too newly chopped for that.

Did this other work you speak of, the shoveling and cutting of brush, amount to anything?

Yes, sir; it did.

How much?

A good deal, because there was little ups and downs in the road and it would be hard for a man to get over it with a load.

How many days' work would it amount to?

That I couldn't tell; a man couldn't do it in one day; don't think he could do it in one day.

Was there two days' work?

351 There might be; it couldn't have been done in less one day, and might have taken two.

How many days' work were done altogether on that particular piece of road at the time you went over it?

I don't know, sir. I suppose it would take five or six days to do that much to the road, as near as I could judge.

Are you Mr. Carr's brother-in-law?

I am.

How many days did you work on the road?

I worked altogether about two days on the road; that is as near as I can come to it.

Did you have your team at work all that time?

No; I did not on the road.

Describe in your own way and as much in detail as you can the road from the point where you began work right down to the house.

I think it ran south or southeast from where I began work. It was a chopped-out road. What I mean by that was the logs were cut out of the way and underbrush. It was quite winding; a good many crooks and turns in it.

Was that road chopped out right down to the house, through to the house?

Yes, sir.

How near the house was the nearest log chopped on that road?

I couldn't tell how close. I suppose it would be safe to say

352 fifty yards, because the timber was thick all the way up to the house; it might not have been fifty yards.

Could you have followed that road to the house before you worked on it without some one showing you the way?

Of course I could.

Before you worked on the road was it sufficiently chopped out and marked so that any one might have followed it?

Yes.

How many trees were chopped down around the house?

I couldn't tell. I never counted them. There was a number, though. I think it would be safe to say five; don't think there was less than five because there was a good many.

State the greatest number you think it would be safe to say.

I suppose there were a dozen.

You say you got some lumber from Carr's house. Are you sure you didn't haul it from the mill?

Yes, sir; because there was no mill there. I mean there was no mill at Carr's house.

Was it old lumber you got from Carr's house?

Old and new mixed.

How much was there?

I didn't haul less than two loads; think it was two loads; thenk there was more old lumber than new.

Did you haul the shingles during the five days you have spoken of?

Yes, sir; it *it* was during the five days.

353 How many loads of shingles?

I didn't haul no loads of shingles; I hauled the shingles with the lumber from Davisson's house; the shingles would not have made a load altogether.

WILLIAM MAHON.

JOB CARR sworn:

State where you reside.

I reside at Tacoma; have resided there since February, 1865.

Do you know the claim in dispute?

I do.

Have you ever been on it?

I have a number of times.

What is the character of the land on that claim?

It is generally heavily timbered, a good deal of underbrush; some places have been burned off; generally over it a very heavy growth of fern, pea-vine, and salal.

State if you have done work on that claim between the dates of June 6th, 1873, and June 28th, 1871; if so, when and what.

I did; some time about the fore part of July, 1871, I went out with my son, the claimant here, for the purpose of making an improvement on his homestead claim; we made a small commencement near the south line; I think nearer the east line than the west line; we worked there some three or four days together, chopping and burning logs, picking and burning brush, and com-

354 menced a small cabin. While I was helping him there, I think, we only run it up three or four rounds; we took our meals there, our dinners every day, and once staid all night.

State if you planted any trees there.

I did not help plant any trees there; all that I did at that place was to help clear off and commence the cabin.

State if you help*id* do any work at any other place and what you did.

I can't give the exact date, but I went out with him—I think in May of 1872, but am not positive; it was between February and June of that year—and selected the site where the house now stands; done some chopping and clearing, burning, and so forth. I helped him there at various times in clearing and in building his house. This work was done at various times between February, 1872, and the latter part of April, 1873. I helped him lay the foundation and build his house; it is a plank house 14 by 18 feet, about a nine-foot story, with framed rafters and shaved shingle roof, one door and one window; a door of dressed timber, what we call a batten door; one twelve-light window, 9 by 13 glass; a reasonably good floor, and altogether a comfortable house to live in for a claim-house. I have seen many claim-houses and it is 25 per cent. better than the average claim-houses through the country.

State if you are acquainted with the value of that kind of

355 work and that kind of material during the time you have mentioned.

I am.

State then what that house was worth then and there.

Well, it was worth, under the circumstances of a claim-house in the woods, not less than a hundred dollars.

Is that opinion based on your knowledge of the amount of work done and the value of the material?

Yes, sir; that together with the trouble and expense of getting the material to the ground.

State how the planks were put in the house.

In the first place, there were sills framed and set on rocks; also plates framed the same size, and the planks nailed up and down from the sills to the plates. At the time we put them up we put them as close together as rough lumber could be put, aiming to make a tight house.

How much were the improvements worth about the house?

I have had experience in clearing just such land. I know, by keeping account of it, that it cost me just about three hundred dollars an acre to clear just such land, and I judge there's a little over a half acre cleared there. In the manner that is cleared I think it is worth all of fifty dollars.

State what that clearing consisted in there.

It consisted in burning down trees, chopping and burning logs and trees, and burning logs and brush.

State whether or not you have passed the night in that house.

356 No, sir.

Can you say of your own knowledge whether A. P. Carr has spent the night there?

I cannot. I have seen him going and coming frequently, and he said he had staid all night on his claim.

Do you know of A. P. Carr's having taken his meals there during the time you worked there; and, if so, how often?

I have eaten with him there a number of times; I should think a dozen.

Do you know of A. P. Carr's wife and child having been at that house and how often?

I don't positively of my own knowledge know of their being there but twice.

State if you have seen them going in that direction with him and how often.

I have frequently seen them pass my house and heard them say they were going to the claim. Sometimes the next day and sometimes in two days they would return and say they had been to their claim.

State if, in addition to the times when you took meals there with your son, you ever saw him carrying provisions in that direction and about how often.

I have, frequently.

State whether you saw while at that house bed-clothing there and provisions for sleeping.

I have seen bed-clothing there.

357 How often and what?

Perhaps three or four times; I would not be positive.

State whether you saw any provisions for cooking; and, if so, what.

I have only seen about the usual camp equipage, a stove pot, teapot, frying pan, tin bucket, cups, and plates, &c.; I don't remember of any other specified articles for cooking purposes; there might have been.

State if you were in that house during the six months pending the 6th of last June; and, if so, how often.

I have only been there once during that time.

State what you saw there then and what time that was.

I didn't see much; it was shortly after his things had been stolen; some of his tools were there and some of his cooking utensils. I think it was the last week in April or the first week in May.

State how you got there.

We went out the county road from Tacoma to the Davisson claim; there took the road that we had cut and opened to his house.

State about when that road was cut, by whom, and what kind of a road it was.

I can't remember exactly, but it was commenced early in the spring of 1872, I think. The first of my knowledge about
358 it, I went out there with my son; he had commenced the road or he told me he had commenced the road; at any rate, there was a road started when I first knew it. I assisted him then to open it, worked with him several days; a part of the way we followed an old road that somebody else had opened that had partly grown up and timber fell across it; we reopened that and then at other places made a new road entirely; it was what I have been used to terming a woods road, a track cut through the woods and brush that a team could go along comfortably; in cutting out the logs we cut them from 8 to 16 feet wide, we cleared out the brush, took out some stumps and stones, dug down some hummocks and filled up holes, and I don't know of any person working at it but my son, son-in-law, and myself; the three of us worked at it. I think I helped him on the road three different days.

State if you know how long your son-in-law helped him on the road.

I have no knowledge of his helping him but one day.

Was a team used in making the road? If so, how long?

The team was there the day that he was helping him on the road. I was not helping him that day, but I was there and saw them at work.

Did you see the team used that day on the road?

I don't think I did. I was there but a little while—just passing.

State whether there was larger logs in the road that it could require a team to haul out.

359 Not many. We generally cut around the large logs.

State what kind of timber this road ran through.

It was what we generally term down there heavy timber.

Was there much or little down timber on the line of the road?

There was considerable down timber, and we made a very crooked road to get round the biggest of it.

From where that former road terminated, how far was it to the house by the road you made?

I should think six hundred or seven hundred yards.

Did you cut the road directly up to the house? How near did you cut it to the house?

We cut the road to where the house now stands, and cut out a place so that a team could turn and go back again.

State if that is what you call a good road for that kind of a country it is in.

I consider it better than the average of woods roads.

State, from all you know, the value of that road, what the road was worth.

I would judge it from twenty to thirty dollars. Couldn't possibly put it below twenty; would sooner put it at forty.

Do you know of any other improvement made on that claim in the two years before June 6th; if so, what?

360 I know of nothing further except that log road.

Do you know of any other improvements on the claim or anything more in relation to the improvements you have mentioned than you have already stated?

I do in regard to where the stovepipe went out through the wall. There was a short piece over the window that was knocked off, and the pipe was put through there. Afterward, when the pipe was taken away, the piece was nailed on again. In regard to my son's cooking there, I know that he cooked there a number of times.

Cross-ex.:

Whereabouts in Tacoma do you live?

I live in block 7, in what is called on the records Tacoma City.

How is your house situated with regard to your son's house?

It is immediately east of it, just one block.

What is your business?

I'm a general mechanic; work at carpentering, painting, paperhanging; sometimes at the rougher cabinet-work.

Have you any shop, and where?

Yes, sir; my shop is southeast of my house; joins onto it.

Does the road your son would take going to and from his claim go by your house?

It goes in an angling direction past my house, back of it.

How near to your house is the nearest point on that road?

361 About a hundred yards.

Will you state how the county road from Tacoma runs with regard to this claim?

It runs nearly due south from Tacoma; it was aimed to be run on the section line nearly to the south side of section five or the north line of section eight, not far from where the road turns off logs, to this claim. The county road turns to the southwest and runs, angling, across section seven, to the southwest corner of that section

in section seven; the road at the nearest point to the claim is about a quarter of a mile distant to the west.

During the year 1871 was there any other road leading out of Tacoma?

There was none that was finished to any part.

You stated that the house was then worth then and there not less than a hundred dollars, under the circumstances of a claim-house in the woods. Explain what you mean by a claim-house.

I mean that in building claim-houses it is always under greater difficulties than building houses on public roads or in town; costs much more to get the materials on the ground and to get back and forth to do the labor.

Who is your son-in-law?

Mr. Mahon, the witness examined this morning.

Redirect:

362 What part of the road did you refer to when you stated was not worth less than twenty dollars?

I understand you to mean the part of the old road we followed and partially cleared out.

Now state the value of all the work on the road from where you leave the county road till you reach the house.

I should say it is worth somewhere from forty to sixty dollars, probably about fifty dollars; could not be less than forty.

JOB CARR.

H. I. CHAPMAN sworn:

Do you know the land in dispute?

I know the land generally known as the Carr claim.

State how long you have known it and how well.

I was familiar with the premises before Carr took it, while Mason had it. I have been in through that country making a reconnaissance of that country, as I have all that peninsula.

State your business.

I am a surveyor and civil engineer; am country surveyor.

State if you have been to Mr. Carr's question house, the house he claims, and when.

363 (Counsel for claimant object to receiving this evidence or any other evidence not founded on witness's knowledge previous to the inception of this contest, June 6th, 1873, as based on the ruling in the case of the witness Byrd.)

A. (This witness being offered to prove the non-existence of certain alleged improvements, it is ruled that the evidence as to the non-existence of said alleged improvements shall be received, but no evidence as to the nature or character of any alleged improvements founded on his observation since the 6th of June, 1873.)

Answer. I was there to-day.

What do you know of the existence or non-existence of the road referred to in Mr. Job Carr's testimony?

(Objected to as to witness' knowledge of the road subsequent to June 6th.)

The only road I know of is a road leading from just north of Davisson's house down to where Peter Mason had his improvements in section 5, on the south half of the section.

Is there any wagon road leading to Carr's house?

None that I ever see. A person might drive around there through the country anywhere by driving over or winding around the logs.

State if you have looked for any road there.

Yes, sir; I took the section line between sections 5 and 8 on the north of 8 and traced it through and found no road crossing
364 it; then I followed up the road leading from just north of Davisson's and found it the same as before excepting the brush growing up in it; nothing there now but a trail. We looked for a road at different places; could find no road leading to where the house stood.

To RECEIVER:

Were you at the house?

Yes, sir.

Did you find any road leading from the house?

No, sir.

How carefully did you look?

He wanted us to look for a road there. I started out, as I said before, and followed the section line in from the county road to the house. I found no road coming in from that direction there. I *wasn't* off in a southwest direction for quite a distance; then I bore to the northwest again to road; came out on the road.

Did you look for any improvements on the claim except for the house and road?

Yes; I looked for improvements.

State on what part of the claim you looked.

South and west from the house. We followed from the house south on a ridge and then crossed over a swale to the next ridge. We examined that. Then there was another swale. We crossed that and it brought us out to the road. Along next the road
365 there is a piece of higher ground. I think there's two pieces of swale land running through there from north to south, nearly out at the north end, 300 feet from the section corner; the other about a thousand feet.

(Diagram, Exhibit A, shown witness.)

Did you go over the ground marked 2 on that diagram?

Yes, sir; it is a ridge—open timber. The small stuff has been killed. There's some green stuff, but there are a good many small dead firs.

Could you find any improvements on that ground?

No, sir; there's no improvements taking a line south and west of that line.

Cross-ex.:

You say he had us make the examination. Who had you make the examination?

Mr. Sproul.

When did Sproul come to you to make this examination?

This morning.

About what hour?

About 11 o'clock.

Where were you when Sproul came to you this morning?

I was working for the railroad company, laying off this town on Commencement bay.

How far is it from where you were at work when he called you at 11 o'clock this morning from this claim?

About two miles, I guess.

366 How long was it from the time he called on you till you went out on the claim?

We started about half after eleven to the claim.

How did you go?

In a buggy.

Did you go all the way to the claim in a buggy?

We went to the corner of section eight, the N. W. corner; from that time on we traveled on foot.

Did you have to hunt any for the section corner?

No; it is just by the road.

How far did you follow this section line?

To the house; it is about three-eighths of a mile. We claimed it a quarter, 1,200 feet.

What was the character of the growth where you chain- it?

It was not very rough there; the swale had hardhack in them.

Was there a growth of fern vines, and so forth, there?

There was a growth of brush there. It did not grow as high as my head. Did not have to break it down to survey the line; did not make an ac-urate survey, only enough to establish the corner. It was not long till we got the survey completed. I guess about twenty minutes surveyed our quarter.

Do you state that you surveyed that distance, over the surface you have described, in twenty minutes?

I don't think it was over twenty minutes. We did not stop to throw any brush out of the way; just kept going along.

367 How long were you employed driving out from where you were at work?

I don't think we were over twenty minutes, if we were that. We drove up very lively, and he was in a hurry.

What kind of a road is this that you drove over?

A very good road; you can trot over it. It has been traveled a good deal.

Where did you go from the point you left off chaining on sectioon 8?

Right on to the house; followed the section turn right to the house — is 100 or 150 feet south of the section line.

When you quit surveying did you stop to do up the *claim?*

No; Mr. Sproul dragged the chain; doing it up as he went on; didn't remain at the house long; about five to ten minutes. I didn't get time to set down. From the point we quit surveying we were not over ten minutes coming to the house; you *wight* say eight minutes. We went as fast as we could through there—the growth for a little way was like all high land—then we went from the house right down the ridge south. Its general course was south; might be a little east; went over a quarter of a mile.

What hour did you leave the claim?

I guess it was about two o'clock.

What was the nature of the growth you passed through going south from the house?

368 There was very little undergrowth but what was killed. I didn't notice much fern. It was easy walking on the ridge; we kept on the ridge; we were about ten minutes walking that. Once in a while we stopped to look for improvements; did not depart much from the course along the ridge; zigzagged a little. I did not know what his object was in asking me to look for improvements. It is pretty heavy timber along the line we traveled; large timber; not so very thick; what they call good logging timber. In the swales it was hardhack, very thick and low. From the ridge you can see clear across the swamp; could not see down through the hardhac*h* growth. We next crossed over the hardhac*h* swamp to the west; passed through the growth of hardhac*h*; did not pass through it; it's marshy there; crossed mostly on logs.

State in what direction is the point at which you turned to the right and crossed this hardhac*h* swale.

South.

Did you cross the next ridge?

Yes, sir; were on that ridge only a few minutes; were walking as rapidly as we could go. We followed up that ridge northwest. About nearly a quarter of the ground in that ridge was pretty much the same as the other. We were then south of a west line from the house; about an eighth of a mile from the house. Then we went on west line that bore to the south till we came in sight of

369 the telegraph poles. Then we went right to the road. We were then about a quarter from where we left the team; hardly that distance; about a thousand feet. In going from the point where we sta-ted on the ridge, going northwest, we were ten or fifteen minutes; about fifteen; reached the county road from that point in about ten minutes. From there we went to the buggy, then up to Davisson's house, got a drink out of the spring, and then went on to the road to Mason's.

It was about eight minutes from the *lines* we reached the county road till we *git* to Davisson's; we followed in the old road from Davisson's that leads into Peter Mason's; followed it about a thousand feet; we walked in there; we then turned around and came down to the county road; followed that down to the buggy, and then came on down to Steilacoom; we were about six or eight minutes going down the Mason road and back to where the buggy

stood; I made no other examination of this claim than I have just stated.

Was your examination of this claim based upon the travelling over it you have just described to me?

Yes, sir.

Is your evidence in this case based upon this going over the claim you have just described?

Part of it and part of it on observation before; I am acquainted with the topography of the country about there.

370–372 State what part of the evidence you have given is based upon prior examination of the claim.

The old road from Davissin's. I knew it before Carr took his claim, in 1870 or the early part of 1871.

Have you since the early part of 1871 had any occasion to make or have you made any particular examination of this claim in dispute except that you made to-day?

No; I have made no particular examination; I have not had any occasion to make any particular examination of it.

Can you swear that there is no road leading from that house to the county road?

No, sir; there is no road leading from the house.

Will you swear that you could not drive a two-horse wagon from the county road to that house?

I don't think you can get a wagon in there from the county road to the house.

Will you swear that within a year you could not drive an ordinary two-horse wagon with a load of five hundred pounds in there from the county road?

I don't think you could; you might get within three hundred yards of the house.

Who was with you to-day?

Mr. Sproul was with me till we got back to the buggy; Sproul and I were alone on the examination till we returned to the buggy; we kept in talking distance all the time.

373 Who was with you in the examination made subsequent to coming back to the county road?

Mr. Boardman; no one else.

When you came back to the buggy the second time where did you next go?

To Steilacoom—about nine miles.

Any hills along the road?

One to come down about 200 yards.

Did you delay to eat any dinner after leaving the claim?

No, sir; we ate nothing till we got here.

Did you delay at Steilacoom?

Only to change horses—about five minutes.

What time did you reach Steilacoom?

About three o'clock.

At what time did you reach Olympia?

After six o'clock—about a quarter or twenty minutes after.

How far is it from Steilacoom here by the road you traveled?

About twenty or twenty-two miles. Some call it twenty, some twenty-two.

Have you any interest, direct or indirect, in this contest?

No, sir; I'm not interested one way or the other.

State if you are not to be largely compensated for all you have done to-day.

374 No, sir; I did not want to come; I was afraid I would lose my place if I come. At first I refused to come altogether.

H. C. CHAPMAN.

GEORGE W. BEARDMAN sworn:

Have you ever seen any improvements on Mr. Carr's claim?

I don't know that I have, with the exception of a logging camp, where they have been cutting and hauling logs off.

Do you know the land in dispute?

Yes, sir.

Go on and state if you have ever been on it and when and how many times.

I was on it the 6th of June last and to-day.

Go on and state how extended your observations were on the claim on the 6th of June.

I went on and went up to where they had been logging and worked on the claim a spell. I did not go much over the claim, but very little; my observation was very limited.

(ROBERT SPROUL called by plaintiff in rebuttal:)

Where have you resided during the six months prior to June 6th, 1873?

I have resided on the Willopah river, in Pacific county, part of the time.

During what portion of the six months referred to you

375 *you* resided on the Willopah river?

I couldn't state exactly; I was going backward and forward frequently; I presume I might have resided there constantly three and a half months; I was in other places.

What other places?

If I was confined to a permanent residence, it might be on the Willopah river for the *6th* months before June 6th.

During how much of that six months prior to June 6th did you reside in Pierce county?

I was in Pierce county about six or seven days with a view to making it a home there.

State in what month of that six you spent that six or seven days in Pierce county.

It was in the month of June, the last of May, one or two days I was there.

How many days during that six months did you spend in the vicinity of this claim?

Six or seven days, to my certain knowledge.

State if you are the same Robert Sproul that made the affidavit for this contest.

The same identical person.

ROBERT SPROUL.

ANTHONY P. CARR recalled:

State if on the 16th or 17th day of the present month,
376 in the town of Olympia, you had any conversation with Robert Sproul, the contestant, in regard to this case.

Yes, sir.

State what, if anything, Mr. Sproul said in regard to his not being properly informed about this case and being induced to act in it by others, and if he had been properly informed in regard to it that he would have taken no steps in it.

Mr. Sproul said that if he had been rightly informed he would not have taken any action in the case, for one remark.

I asked him, Why did you, a stranger, contest my claim, and his reason was, If I had not done it other parties would. Those were his words. He said other parties had informed him I had abandoned my claim. There was a few words about a corn fan, but that was the bulk of the remarks—to reduce 'em down.

A. P. CARR.

LAND OFFICE, OLYMPIA, WASHINGTON TY.

ROBERT SPROUL
vs.
ANTHONY P. CARR. } In the Matter of Homestead Entry No. 1368.

We hereby certify that the foregoing testimony was taken and reduced to writing before us; that before taking the same
377 each witness was sworn to tell the truth, the whole truth, and nothing but the truth; that the deposition of each witness was read over to him before signing, by him admitted to be correct, and signed by him in our presence.

J. T. BROWN, *Register.*
ROBERT G. STEWART, *Receiver.*

Affidavit to be Filed Before Contest of Homestead Entry.

U. S. LAND OFFICE,
OLYMPIA, W. T., *June 6th*, 1873.

Personally appeared before me, J. P. Clark, register of the land office, Olympia, W. T., Robert Sproul, of Pierce county, Territory of Washington, who upon his oath says:

That he is well acquainted with the tract of land embraced in the homestead entry of Anthony P. Carr, No. 1368, made June 28th, 1871, embracing the W. ½ of N. E. ¼ and E. ½ of N. W. ¼ of section 8, in township 20 north, of range three east, and knows the present condition of the same; also that the said Anthony P. Carr has wholly abandoned said tract and changed his residence there-

from for more than six months since making said entry and next prior to the date herein; that said tract is not settled upon and cultivated by said party as required by law, and this the said
378 contestant is ready to prove at such time as may be named by the register and receiver for a hearing in said case, and he therefore asks to be allowed to prove said allegations, and that said homestead entry No. 1368 may be declared canceled and forfeited to the United States—he, the said contestant, paying the expenses of such hearing.

ROBERT SPROUL.

Sworn to and subscribed this day and year above written, before—

J. P. CLARK, *Register.*
ROBERT G. STEWART, *Receiver.*

(Endorsed:) Affidavit of contest. H'd. No. 1368. By Anthony P. Carr. Let for hearing July 17th, 1873.

Notice.

LAND OFFICE AT OLYMPIA, W. T., *June 6th*, 1873.

Complaint having been entered at this office by Robert Sproul against Anthony P. Carr for abandoning his homestead entry No. 1368, dated June 28th, 1871, embracing W. ½ of N. E. ¼ & E. ½ of N. W. ¼, section 8, township 20 north, of range 3 east, in the county of Pierce, W. T., with a view to the cancellation of said entry, the said parties are hereby summoned to appear at this office on the 17th day of July, 1873, at one o'clock p. m., to respond and furnish testimony concerning said alleged abandonment.

J. P. CLARK, *Register.*
ROBERT G. STEWART, *Receiver.*

379 (Endorsed:) Notice of contest. H'd. No. —. By ——.

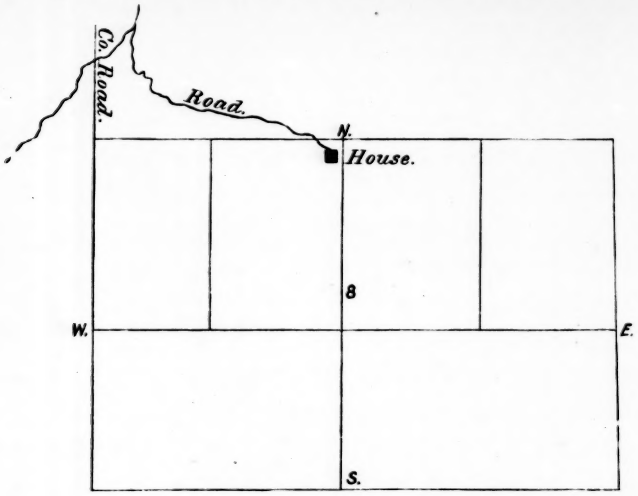
Sheriff's fees: Serving summons	$1 00
28 miles travel, at 10 cts. per mile	2 80
	$3 80

Sheriff's fees.

Executed by delivering to Anthony P. Carr a copy of the within notice and reading said notice to said Anthony P. Carr at the time of delivering to him the copy aforesaid. Done this 11th day of June, 1873, at Tacoma, Pierce county, W. T.

D. W. C. DAVISSON, *Sheriff,*
By G. M. GRAINGER, *Deputy.*

EXHIBIT A.—Diagram Made by A. P. Carr.



380 Robert Sproul, contestant in case of Sproul *vs.* Carr, A. P., being duly sworn, state- that new and unexpected matter- have appeared in the testimony for the said claimant, to wit, the alleged existence of a certain road and of certain clearings and cultivated patches the existence of which was wholly unknown to him and which, after diligent search and inquiry, he never had found or heard of heretofore, and he asks that this trial be continued one day to enable him to — evidence material to the issue on these new matters in rebuttal.

ROBERT SPROUL.

Subscribed and sworn to before me this 18th day of July, A. D. 1873.

J. T. BROWN, *Register.*

Before the register and receiver, U. S. land office at Olympia, W. T.

ROBERT SPROUL, Contestant,
versus
ANTHONY P. CARR, Claimant.

Agreement of Hazard Stevens, Att'y for Contestant.

381 ROBERT SPROUL, Contestant,
vs.
ANTHONY P. CARR, Claimant.

Before register & receiver, Olympia, W. T.

GENTLEMEN: The idea, the spirit of the homestead law is to give farms and homes to poor men; to enable the poor and deserving

citizen to select a spot from the wide domain of public lands which he might make exclusively his own, where he might establish his hearth-stone and build up a permanent and cherished home for himself and his nearest and dearest.

The law provides but a few necessary safe *grounds* to protect the homestead settler and the public domain from the eager*ship* and rapacity of speculators.

First among these, actual residence and cultivation are required. Next, the settler is required to take the land for his own exclusive benefit and is debarred from selling it, and, after his continuous residence and cultivation, before he can acquire title he must make oath that no part of the land has been alienated, and finally the exclusion of mineral lands and the whole terms of the law prove that the homestead right is confined to agricultural lands—
382 lands taken for the purposes of agriculture, and not of trade, mining, or speculation of any sort.

Anthony P. Carr, the homestead claimant in this case, from a date long anterior to his homestead entry in June, 1871, for a period of two years last past up to the present time, has resided continuously in his own house upon his own land in the town of Tacoma, over two miles distant from the land he claims. During all this time his home, his abode, his wife and child, his business, were all in Tacoma. He rarely, if ever, spent a night upon his claim; his wife rarely, if ever, visited it. He had upon the land at best nothing but a bare board shanty entirely unfinished, and, according to the evidence, unfurnished and uninhabitable. He testifies that he worked on his claim days and returned home nights; that his wife was too delicate to stay on the place. Four witnesses, including his three nearest and next neighbors, men accustomed to meet him daily, to call at his house evenings and interchange social visits and courtesies with his family, prove this state of facts; he himself does not deny it.

No agricultural improvements whatever have been made upon the land by Carr, with the possible *acc*eption of a weeks' work done on the extreme southeast corner of his claim when he first made his entry and soon afterwards abandoned. His testimony that he cleared off three or four acres of land, at another place sowed grass seed, planted potatoes, worked over one hundred days at that place, is unsupported by a single witness
383 not even his father, and is directly refuted by Hanzelman, who had been over the ground locating a road; by Steel,—frequently and habitually hunted his cow over that very ground; by Sproul, who sc*h*ratched the land in every direction on purpose to ascertain whether any improvements existed, and finally by Chapman, the county surveyor, who, when Carr had been compelled on cross-examination to locate his clearing and improvements and mark the spot on a diagram, went there expressly to find that clearing and improvement, and swears that they are not in existence, and not one of these witnesses in all their hunting, surveying, traveling, and searching over and across this claim during the last two years have ever discovered a trace of agricultural improvements;

and then, in the reckless spirit of speculation and rascality which characterizes every stage of this fraudulent claim, Carr sells to Renton, Smith & Co., the great lumbering firm of the Port Blakely mills, the timber standing on the claim at fifty cents per ell feet. In the short space of from five to eight weeks this firm puts a gang of men at work, cuts a logging road a mile long from the shore to the claim, extends it 600 to 800 yards into the heart of the claim, with branch roads radiating in every direction after the manner of logging works, cuts down and hauls off 700 trees containing half a million feet of lumber, cutting and slashing down the choicest trees over an acre of from forty to eighty acres,
384 leaving the remainder standing as a monument of reckless and wasteful robbery of public timber, and this, forsooth, in order to assist in clearing up ten or twelve acres of land. At this rate he would have stolen all the timber on the quarter section in order to clear twenty acres, and he alleges that they agreed to cease work at any time upon his mere bidding. Would Renton, Smith & Co. have put a gang at work and built a mile of road upon such a mere revocable license? Whatever indulgence might be due an honest settler, who, from force of straitened circumstances, had failed to fulfill strictly all the homestead requirements, Carr's claim, taken for speculation, held in wilful disregard of every provision of law, and finally bolstered up by unblushing perjury, affords as good a case for a salutary example as perhaps ever came before the department.

Carr carefully notes the testimony of the contestant's witnesses; he listens to their searching cross-examination; he marks wherein their evidence might fall short of full proof. His counsel, by a vigorous and minute cross-examination, has drawn out from them just how long Carr might have been absent from home, just how much of the land might have been improved without their positive knowledge to the contrary, and, having thus found an opening, Carr proceeds to fill it with his testimony.

385 The proof of residence in Tacoma is too full and conclusive to be disputed. He drops this part of the case. Carr's total failure to follow up his entry by residence and cultivation, his continued unchanged residence in another place, is a complete abandonment. An occasional cursory visit such as he made—made, too, for the sole purpose of holding the claim—cannot avoid the penalty of abandonment.

The only part of the land in dispute which none of the witnesses had visited was the southeast corner. Accordingly, Carr, secure from contradiction, swears he made his first improvement in the S. E. corner, yet it was the most remote corner of the land, the farthest from any road, the least likely to be selected from any settlement. The very improbability of the whole story and the light of Carr's motives refutes it. His testimony in regard to clearing three or four acres in another place, planting potatoes, sowing grass seed, etc., is not corroborated by a single witness and is directly contradicted by four unimpeached witnesses. Is not such wilful barefaced perjury conclusion as to the *mala fides* of this claim?

It is related that a certain man, when his attorney, after hearing the testimony offered by the contestant, whispered him that he had no case, replied, "You have not heard me testify; wait till I swear. I'll put a hump in their backs yet." In this instance Carr, in his reckless efforts to "put a hump in their backs yet," has only succeeded in proving himself a liar.

386 Observe his reluctance to state exactly the location of his clearings. How difficult, too, — was to make him mark the spot on a diagram. Note his exaggeration in swearing to 4,000 feet of lumber in a house which, from its dimensions, cannot contain over 1,000 feet, including the boards not used. His board shanty he calls a plank house. The rough stones in the fireplace he calls faced stones, and so on. How improbable his story about the stove. How flatly he is contradicted by two good witnesses in regard to the stove-pipe hole. Can it be a doubt that the stove, like the clearing, is a mere invention?

Where *was* the traces of his cooking? Why were there no bones nor scraps nor vestiges of any meal having been cooked or eaten about the place? How ingenious, yet how flimsy and improbable, is his tissue of testimony—his clearing and cabin in the most remote corner of the claim which no one except his father ever sees; a large clearing which no one but himself dares swear to and which cannot be found; the whole end or side of his house knocked off to make room for a fireplace; a stove introduced to account for the cooking; all his things providentially stolen just before the witnesses examined his house. Consider the attempt made after the contest began to finish the fireplace, to batten the house, to put the premises in fit state to swear to at the trial.

387 See how his only imprortant witnesses, his father, in attempting to make evidence as to Carr and his wife going to and returning from his claim repeatedly, outswears even Carr himself, who does not claim that his wife ever spent more than one night on the place and that on the S. E. corner.

All the testimony in regard to the road is unimportant except as showing Carr's *fides* or to impeach the witnesses. The former is already established. Undoubtedly Carr and his brother-in-law did work on the road. Undoubtedly they used the old road as far as it went, then probably cut out some logs, and by winding around among the trees and fallen timber, following the partially open ridge upon which the house is built, succeeded in reaching it with a team. This *by*pothesis, allowing for much exag-eration on the part of Carr's *p*rother-in-law, reconciles the conflicting testimony, to some extent, and is the only one that can reconcile it. That there is any road leading up to his house or on his claim cannot be believed. It is impossible that Sproul, Steele, Hanzelman, & Chapman could be mistaken in such a matter or that they would have sworn falsely about it. They would not dare to lie about a thing so easily determined, and, on the other hand, the evide*o*rt bias of Carr's father and brothers-in-law is shown by their testimonr and sufficiently accounts for their efforts to back him up in regard to the road, if nothing else.

388 Carr's excuses for selling the timber standing on the land comport well with the remainder of his testimony.

The fact that he did sell the lumber to a great lumbering firm which in less than two months stripped off half a million feet is not denied. His excuses that he doubted his right to sell; that he consulted a lawyer; that he wanted to clear the land and had begun to clear it (he puts this clearing under the logging road quite safe from contradiction), and finally that he could at will order off Renton, Smith & Co. and set their men and their teams at work clearing his land are too flimsy.

They show plainly, however, that he did not act in ignorance, but in open wilful disregard of law. They prove his bad faith almost as well as his perjury.

If such a claim can escape cancellation, then it is quite useless ever to attempt a contest, trials become a farce, and the safeguards of the law a sham.

HAZZARD STEVENS,
Contestant's Attorney.

Olympia, W. T., July 23rd, 1873.

389 In the Matter of the Alleged Abandonment of Homestead Entry No. 1368 for W. ½ of N. E. ¼ & E. ½ of N. W. ¼, Sec. 8, T. 20 N., R. 3 E.

ROBERT SPROUL, Contestant,
vs.
ANTHONY P. CARR, Claimant.

It appears from the evidence that Anthony P. Carr claims a certain tract of land known and described as the W. ½ of N. E. ¼ & E. ½ of N. W. ¼, sec. 8, T. 20 N., R. 3 E., having entered the same June 28th, 1871, under the provisions of the act of July 15th, 1870.

It is shown by Carr and his witnesses that — house which is designated as a "claim-house" by one witness is actually built, and has been upon this land for a long period of time. This fact is not disputed by contestant, but he seeks to show that said house is not a house such as would be comfortable or reasonable house to live in; that it has cracks between the boards of from ½ inch to 8 inches wide; a foundation for a fireplace laid, but fireplace not completed; that there are not and have not been any of the appliances of a home, showing that the house has not been used as a residence.

It is shown that claimant with his wife and child had their
390 actual residence in Tacoma, a small hamlet 2 miles distant from this claim, during all the time from inception of claim to the present time, where he is known as a photographer and doer of odd jobs, and that at no time has he had an actual or constructive residence *residence* upon the claim.

Improvements of various kinds are alleged by claimant, the principal of which is clearing of an old road and making some new. Two witnesses whose testimony is unimpeached swear that there is

no road to the house; both searched for it and failed to find any road.

On the other hand, the father and two brothers-in-law of claimant helped build the road; one hauled the lumber to the spot where the house now stands. All the witnesses agree the timber is heavy; that the claim is cut into alternate ridges, partially clear of undergrowth from effects of previous fire, and swails densely thick with underbrush and ferns.

The presence of the house must be accounted for upon the hypothesis that there is a road; that, there being no road, a team could be driven into the location of house by driving carefully around logs and trees on this partially open ridge, or that the lumber and other materials for building were carried in by hand. Granting that there is a road to the house, which seems dubious, it must have been built early during the occupancy of the premises.

391 Claimant does not show, however, that this road has been used sufficient to entitle it to be considered a valuable improvement, nor does he show that he followed up such improvement by other improvements or by actual occupancy of the premises as a house.

He alleges certain other improvements—clearing a small space, building a log house, then tearing it down to remove to present location of house, and planting some few fruit trees—but admits that person might pass right through this place and never see any improvements.

His other improvements claimed consisted in sowing a peck of timothy seed, in which he had not enough interest to go to see if it came up, and planting some potatoes, which, he admits, was done upon very poor ground where nothing could grow, and was done to prove up on his claim.

There seems to be a recognized existence of a special feature in making or holding claims, which here is called "claim-house," "claim road," or in general "claim improvements," showing clearly the want of good faith.

Admitting that there is a house and that there is a road, both known as claim improvements, it is patent that in the matter of residence and cultivation there has been no compliance with the law—*bona fide*—and but the feebled shadow of pretended compliance.

The evidence adduced in relation to contract of claimant with a Mr. Cilly shows that claimant allowed said Cilly to enter

392 upon the land embraced in this h'd entry and to construct thereon a regular logging road and cut over a large space of ground, culling the trees fit for lumber and leaving the unsound or "conchons" ones standing, and that notwithstanding claimant was not an actual *bona fide* settler residing on the land and performing such acts as to indicate it to be his intention to make the premises his permanent establishment, and that the improvements were not in anywise commensurate with extent of land cut over or number of trees thus sold and removed.

From the testimony of claimant and his father it appears that claimant has been upon his place within the six months imme-

diately prior to June 6th, 1873, the date of inception of this contest; has slept there perhaps two or three times, and that late in spring he had a cooking stove there which was removed in April or May. From these occasional visits to the claim we can but draw the conclusion that said A. P. Carr did not wholly abandon his said claim, but we are more strongly of the opinion that the utter disregard of the spirit of this beneficent law, which gives to the poor man upon easy and reasonable terms what he could not otherwise obtain, would in equity be sufficient ground for cancellation of the homestead entry, No. 1368, of Anthony P. Carr.

Olympia, W. T., August 10th, 1873.

J. C. BROWN, *Register.*
ROBERT G. STEWART, *Receiver.*

393 In the Matter of the Alleged Abandonment of Homestead Entry No. 1368, wherein Robert Sproul is Contestant and Anthony P. Carr is Claimant.

Appeal from the decision of the honorable Commissioner of the General Land Office sustaining the finding of the local land office, W. T., rendered August 10th, A. D. 1873.

Please take notice that Anthony P. Carr, claimant above named, appeals to the honorable Secretary of the Department of the Interior from the decision of the honorable Commissioner of the General Land Office, rendered in the above cause of the alleged abandonment of homestead entry No. 1368, for the following, among other, reasons:

1st. Because the testimony adduced shows Anthony P. Carr, claimant, made homestead entry No. 1368 in compliance with law, and forthwith began residence and cultivation thereon.

2nd. Because the evidence establishes that such residence and cultivation has been continued in compliance with the law.

3rd. Because of the wrongful exclusion of testimony on behalf of the claimant.

4th. Because the question of cutting of timber was not properly before the court, and also because the testimony shows that
394 such cutting was done in good faith and in conformity to law.

To J. T. Brown, register; Robert G. Stewart, receiver, and to Hazzard Stevens, Esq., att'y for Robert Sproul, contestant.

J. B. ALLEN & J. S. ALLEN,
Attorneys for Anthony P. Carr, Claimant.

Filed January 5th, 1874.

J. T. BROWN, *Register.*

395 Before the Register and Receiver of the U. S. Land Office at Olympia, W. T.

ROBERT SPROUL, Contestant,
vs.
ANTHONY P. CARR, Claimant.

To the Honorable Willis Drummond, Commissioner General Land Office.

SIR: In reply to the appeal taken by claimant from the decision of the Olympia land office, I respectfully submit that the claimant, A. P. Carr, is proved totally unworthy of credit, having been directly contradicted in several most material points by impeached witnesses, by the improbable and evidently made-up character of his testimony, and by his conspicuous failure to support his own statements as to cultivation by a single witness, a think, too, so easily established if it had any existence, and which, considering his efforts after the inception of the contest to batten and complete his house ready for the trial, he would not have failed to prove had not his whole story been a falsehood.

His pretended service as a soldier during the rebellion
396 rests solely upon his own testimony. The favor *the favor* shown the true soldier makes it the more imperative that fraudulent claim- be rigorously dealt with. His alleged ability and the alleged infirmity of his wife are put forward as an excuse for non-compliance with law and are a confession of such non-compliance, but they are wholly unsupported by other evidence than his own testimony and are most improbable in view of his frequent trips, prospectings, etc., etc.

The testimony proves conclusively that Carr never made a residence upon his claim; that for more than six months next preceeding the contest he made no improvements upon it and all his acts of settlement were an occasional cursory visit, and that he acted in bad faith from first to last. This state of facts constitutes in the eye of the law a complete abandonment of the tract in question. Your attention is respectfully called to this point, for it is believed that the register and receiver erred in not so finding more strongly.

The 1st, 2nd, 3rd, and 7th grounds of appeal are believed to be contrary to the facts.

In reply to the 4th and 5th grounds, the record shows that the excluded testimony on behalf of claimant was testimony as to the condition of his house after the contest began and after he had battened and finished his house on purpose to swear to at the
397 trial. The evidence admitted on part of contestant was to disprove the existence of certain things alleged by claimant and to impeach claimant. The testimony excluded was concerning a state of things prepared and made ready for the trial after the contest began. The evidence admitted was touching the very existence of things alleged and the time of observation was not material. In no single respect is the testimony in the two case- alike.

The 6th and 8th grounds refute themselves. The law constitutes

the local land office something more than a mere board to take depositions, without power to exclude irrelevant matter. The *mala fides* of claimant is so clearly established by his timber-selling that counsel might well wish to exclude all testimony relating to it.

The argument of counsel is ingenious. By considering the testimony of each of contestant's witnesses separately, by assuming that everything that is not proved against their client is proved in his favor, by insisting that Carr's unsupported and impeached testimony is verity and utterly ignoring his inconsistencies and prevarications and the crushing weight of the attending circumstances, by some bold assertion, and by mis-tating the testimony in more than one instance, they spin out an argument of 62 pages whose labored and manifest unfairness is but the necessary reflection of so fraudulent a cause.

HAZZARD STEVENS,
Attorney for Sproul.

398 In the United States Local Land Office at Olympia, Washington Territory.

ROBERT SPROUL, Contestant,
vs.
ANTHONY P. CARR, Claimant.

In the matter of the application of Robert Sproul, contestan-, to have the homestead entry of Anthony P. Carr, No. 1368, embracing W. ½ of N. E. ¼ and E ½ of N. W. ¼ of section 8, township 20 north, range 3 east, in Pierce county, W. T., dated June 28th, 1871, cancelled.

Please take notice that the above-named claimant hereby appeals from the decision rendered in the above matter on the 10th day of August, 1873, for the following grounds, among others, to wit:

1st. That the said local land office erred in receiving testimony or rendering a decision on any other matter than that of abandonment, as in the notice of contest in the above cause specified.

2nd. That said office erred in making a recommendation that said claimant's entry — cancelled after finding in his — from the said issue of abandonment.

3rd. That the findings on which said recommendation is made are contrary to the testimony and against law.

399 4th. That said office erred in rejecting all testimony offered by claimant of observations made subsequent to June 6th, A. D. 1873.

5th. That said office erred in receiving and considering on behalf of contestant testimony of a like nature to that rejected in behalf of claimant, as will appear by the rulings in the transcript.

6th. That said office erred in refusing to have placed on the record all questions objected to and the answers thereto, together with the grounds of such objections, that the same might be passed upon by the appellate tribunal.

7th. That said office misconceived the nature of the cause, in that it compelled said claimant to bear the burden of proof.

8th. That said office erred in receiving any testimony relative to the selling of timber from the said land by claimant.

Dated September 5th, A. D. 1873.

J. B. AND J. S. ALLEN,
Attorneys for Anthony P. Carr.

To J. T. Brown, register, and Robert G. Stuart, receiver, and to Hazzard Stevens, Esq., att'y for Rob't Sproul, contestant.

400 (Endorsed:) U. S. land office, Olympia, W. T. Contest. Robert Sproul *vs.* Anthony P. Carr. Notice of appeal. Due service of a copy of the within notice is hereby admitted, at Olympia, W. T., this 15th day of September, A. D. 1873. J. T. Brown, register; Hazzard Stevens, attorney for Sproul; J. B. and J. S. Allen, att'ys for Anthony P. Carr. Original.

401 In the Office of the Honorable Secretary of the Department of the Interior of the United States.

Appeal from the decision of the honorable Commissioner of the General Land Office sustaining the findings of the register and receiver of the local land office at Olympia, Washington Territory, rendered August 10th, 1873, in the matter of the alleged abandonment of homestead entry No. 1368, wherein Robert Sproul is contestant and Anthony P. Carr is claimant, declaring said homestead abandoned.

ANTHONY P. CARR, Appellant,
vs.
ROBERT SPROUL, Respondent.

To the honorable Secretary of the Interior:

The claimant and appellant herein brings the hearing of the cause from the decision of the honorable Commissioner of the General Land Office declaring homestead entry No. 1368 abandoned.

No opinion of the honorable Commissioner in the matter was returned to the local land office. This fact compells appellant to base his argument upon the evidence in the case and the findings of the local office.

402 Appellant's view of the merits of the case, differing in every essential respect from the findings of the local land office, makes it necessary to ask the indulgence of this honorable tribunal to a somewhat critical inspection of the lengthy testimony in order to show that his objections to said findings are well sustained.

From such review of the testimony hereto appended, carefully made, appealing in all cases to the language of the witnesses (and referring to the page of the manuscript upon which the same will be found) for the establishment of the propositions claimed—

We hold, first, that Anthony P. Carr, a discharged soldier in the

war of the late rebellion, entitled to have three years' military service accredited to his five years of residence and cultivation upon his homestead claim, did, on or about June 28th, 1871, make homestead entry No. 1368 and within a few days subsequent to the making of said entry proceeded to clear and make preparations for the building of a house.

That he opened a wagon road, constructed a house, and took his family upon said claim within the time prescribed by the act under which he took his claim.

2nd. That such residence began was in good faith continued.

A. That the claim was three miles distant from a small village, Tacoma, in the midst of a forest of heavy timber and
403 dense undergrowth, with no settler in its vicinity.

B. That Mr. Carr is a feeble man, to a great extent disabled from the effects of a wound received in battle; that his wife is an invalid and was under medical treatment much of the time from June 28th, 1871, to the time of filing the contest in this case, and that during this time she had a babe of tender age.

C. That Mr. Carr is poor, and that he was compelled during these two years to support his family and earn all monies expended in improving his claim from such employment as he could find in the village of Tacoma.

That during this time nothing could be derived from the claim save the few shingles made and for which an uncertain market might be found.

That in view of all these facts Mr. Carr was of necessity absent much from his claim, and that when he went out to work he was compelled to send his invalid wife and child to the village.

Mr. Carr claims that he went from the claim for these necessary purposes only, and that at no time was he absent six months, and that at no time did he go away with intent to abandon.

The fact that the four witnesses, Steele, Hanzelman, Botsford, and Atkinson, residents of the village of Tacoma, are called to
404 establish abandonment discloses the solitary location of the claim; besides, we hold that good faith in evidence is entirely consistent with their testimony. None claim to have seen him in the village more frequently than his circumstances required, and the witnesses themselves fully and frankly concede his residence upon his claim was consistent of any knowledge they had of him.

There is nothing from any source, we confidently say, to dispute residence and the enumerated cases of more than two hundred different days and parts of days spent on the claim.

In cases of necessity less urgent a former Commissioner of the General Land Office has decided that entire lack of residence does not work an abandonment.

(See ruling of Honorable Joseph Wilson, Com., 2 Lester, 265.)

(Written from Monday.)

Claimant complied with the law in the matter of improvements and cultivation.

We hold that when the local office went beyond the question of

"change of residence" or "abandonment for six months," as provided in section 5 of the homestead act, it transcended its jurisdiction, and as a consequence the claimant became the sufferer; that the issue, in the estimation of the local office, became one not
405 of abandonment but of final proof, and that instead of occupying the position of one who responds to an alleged charge of abandonment with the presumption of good faith in his favor, while the burden of proof rests upon the party who seeks to oust him from his claim, he is at once placed in the attitude of one who must make a satisfactory affirmative showing of residence and cultivation as in final proof. This honorable court perceives that the proof adapted to the first case is not the proof required in the latter, and that the claimant suffers a great injustice.

But even under these adverse circumstances we hold the appellant showed positively by the cor-oborating testimony of several witnesses that he had made a wagon road leading to his claim at a necessary cost of from $40 to $60; that he had built a frame dwelling-house of substantial material of the value of from $100 to $150; that he had made other improvements at a cost of from $150 to $200 in clearing and such work, making a total of $300 or $400.

If allowed proportionally for his three years of military service, his improvements would correspond to those under the original act, making improvements to the value of from $800 to $1,000.

4th. Wrongful exclusion of testimony

Mr. Carr was deprived of the testimony of George Byrd based
406 upon observations made upon the claim subsequent to the filing of the affidavit for contest and of the testimony of other witnesses founded on like observation-, and was also not allowed to have such rejected testimony put upon the record that its competency and value might have been passed upon by the appellate tribunal.

This ruling shut out from him essential testimony respecting his improvements and their conditions, besides giving him no opportunity of rebutting the contestant's evidence respecting the same, which chiefly rested upon observations made within this very period.

Claimant holds that all these circumstances and rulings were unjust, and holds that he should be given an opportunity of showing the truthfulness and fidelity of his claim of improvement and cultivation, when those questions are properly before the local office, when he may produce witnesses relative thereto.

5th. Cutting timber.

Again, we hold the charge of cutting timber was illegally drawn into the case, when the claimant was entirely unwarned by the notice of claimed abandonment, and also by the provisions of the law itself.

If true it could neither throw light on the question of "abandonment for six months" or "actual change of residence."
407 The offence of cutting timber is a penal one against the dignity of the United States, to be tried by jury.

Its punishments are prescribed. Fine and imprisonment and not forfeiture are the consequences. This offence could not be passed

upon and punishment inflicted by the land office with a punishment not known to the statute.

If such punishment should be imposed even by the proper court it would be an assumption of legislative authority.

The fact is notorious that this matter of cutting timber has been wholly ignored by the courts, though strenuous efforts were made to secure their action upon it.

But the fact established by the evidence (by the only witnesses cognizant of the cutting, Mr. Carr and Mr. Simmons) is that it was done for the purpose of clearing the land with a most careful and conscientious regard for the law and after professional advise had been given to the effect that the cutting was lawful and proper. If the contestant's testimony is true, thirty acres were cut over, less than one-fifth of the claim; if that of Mr. Carr is true, not to exceed ten acres. Either, under the circumstances, would be within the limit of *bona fides*. To burn such acres is common on all claims. To turn this timber to a valuable use is much more in accord with public policy. In the latter case so much property is saved to the community and the settler is benefitted, while the former is loss to all.

408 The only person who intimates bad faith is the claim-jumper, who confesses he never saw the claim until one week before the beginning of the contest, when he was an entire stranger in the vicinity. His testimony is a mere opinion. The fact that he took numerous witnesses upon the claim to show to them the evidences of Mr. Carr's bad faith, and called upon none of them to testify respecting a matter capable, if true, of absolute proof, furnishes the strongest inference against the truthfulness of his testimony regarding the timber.

Coupling this cutting of timber with the facts that the entire claim was densely grown over, and that as Mr. Carr's time of residence was within a few weeks of expiration, when the injury of such cutting was his own and not the Government's injury, we hold that it is in entire harmony with the spirit of the law, the instructions of the department, and the ruling of the courts.

Finally, we urge that Mr. Carr is identified with this by all the hardships and privations of a frontier life; that in the sacrifice of his manhood's strength in the service of the country; that in his disability incurred in battle, he appeals to both the magnanimity and the generosity of that homestead act which was framed in the spirit of gratitude and generosity toward such citizens as he.

409 He sought the claim in the wilderness when its selection excited no rivalry, when its present value was small and its future value not flattering.

The fact that a fortuitous event has given prospective value to this claim should in no manner be allowed to lessen the claim of Mr. Carr to the consideration of his Government.

All Mr. Carr asks is that, as he has fairly met and successfully answered the charges of abandonment and actual change of residence as provided by law, he may be allowed to appear before the local land office to submit his showing in final proof, and if then his

testimony does not establish his *bona fides* in all the requirements of the homestead act and indicate his conduct throughout he is content that the Government withhold this land from him.

But with all earnestness he does protest against having his claim wrested from him by the *un*provising of issues of which he is given no notice either by the land office or by the law, and by his remoteness from the place of trial be unable to procure witnesses in rebuttal of them.

J. B. AND J. S. ALLEN,
Attorneys for Anthony P. Carr, Claimant and Appellant.

410 *Reviews of Decision and Testimony.*

Says the finding:

"It is shown that the claimant, with his wife and child, had their actual residence in Tacoma, a small hamlet 2 miles distant from this claim, during all the time from the inception of the claim to the present time, where he is known as a photographer and doer of odd jobs, and at no time has he had an actual or constructive residence on his claim.

(Opinion, page 2.)

Claimant Carr testifies he resided upon the claim, and that he has never changed his residence or ever abandoned it.

No witnesses testify that Mr. Carr abandoned the claim, but by attempting to show residence elsewhere it is sought to show the claim must have been abandoned.

To establish this proposition four witnesses are called—Steele and Hanzelman (whose visits to the house on the claim were confined to six weeks before the trial) and Atkinson and Bolsford (neither of whom have ever been upon said claim). Mr. Carr testifies to living on the claim and instances days and nights spent there abundantly sufficient to make him a *bona fide* settler. The testimony of the above four witnesses is consistent with Mr. Carr's evidence.

411 Mr. Steele says, "Have not known the whereabouts of claimant Carr for last six months." "He might or might not have been absent from Tacoma for a week and I not know it." When asked if Carr might not have been absent from Tacoma a month and he not know it he replies, "He does not know;" says he does not know of Carr's abandoning claim for six months. (Manuscript, pages 12 & 13.)

Mr. Atkinson thinks "Carr and family might have been 2 days at a time on claim and I not know it."

That Carr's going to the claim with provisions and household furniture was not inconsistent with his knowledge of him, but does not think he could have spent half his time, a day at a time, on the claim without my knowing it (pages 17, 18, 1st of 19).

Mr. Hanzelman testifies he spent a part of his time during this period away from Tacoma two or three times a week (page 36).

"Carr might have been gone 2 weeks at a time; I did not watch

him." "Will not swear, but he might have been away a month at a time in last six months (pp. 38 & 39).

Mr. Bolsford: "He might have been away every day in the week for a portion of the time (6 months before contest) and I not known it and on his claim." "I was under the impression that he was on his claim from what he told me. I have seen him with his hoe and spade and frequently with his gun." He might at various times have slept on his claim, taken "provisions and bedding" "and his wife and child" (p. 47). "He might have spent four and a half months of the last six on his claim" (folio 48, 1st part).

4 2

"Agreeably with my knowledge he might have spent four or five nights out of the 7 on claim in the 4½ months referred to" (p. 52, 1st part).

Agreeably with my knowledge they (Carr, wife, and child) might have spent one-half or two-thirds of the time on the claim (p. 52, latter part).

Contestant and claimant agree the claim is heavily timbered, with dense undergrowth (p. 62, 1st part; p. 96, 1st part).

Mr. Carr is the only witness who testifies as to the character of the soil, describes it as very poor, and to a large extent unfit for cultivation (p. 98, 1st part; p. 117, last part).

Mr. Carr is a poor man, compelled to work away from his claim for the support of his family, and to defray the cost of the improvements he made. This is his testimony—contestant does not question it (p. 96): "Aside from shaving shingles and selling them I know of nothing I could to make any part of my living from the claim for the first 2 years after I took it" (p. 96).

Carr is not a strong man; unable to do heavy work from the effects of a wound received in battle during the war of the rebellion (p. 95, middle).

413

His wife, an invalid under medical treatment much of the time since taking claim, with a babe of tender age much of the time—the wife could not be kept on the claim away from the village (p. 97).

Mr. Carr'- financial condition and physical condition of himself and wife are not questioned, though most of contestant's witnesses have known them for years.

We cite all these circumstances in connection with the testimony of the four witnesses on abandonment to show their entire harmony with Mr. Carr's testimony of residence in good faith on the claim.

All concur as to the character of the surrounding country. Contestant's witness Hanzelman says, "It was all one unbroken wilderness for 3 miles" (p. 96, last part).

This explains Carr's frequent appearance at Tacoma, the village two miles distant. Here only he found society; here his relatives resided; here he went with his wife in her sickness; here he left her when unable to be upon the homestead; here all his business was transacted; here he purchased supplies for his claim; here was the only place he could go to get work as a photographer or do odd

jobs to earn a living for himself and family and to maintain them while he was improving the claim.

Every day he might have been in the village of Tacoma, consistently with good faith in his residence upon the claim.

414 How, then, with Mr. Carr's testimony that he did so reside upon the claim, staying there day and night and instancing from 100 to 200 different days spent there at labor, can it be found "that he had never had an actual or constructive residence upon the claim"?

Next a finding is made relative to the road, "the existence of which seems dubious:" but admitting it to have been made, continues the opinion, "it must have been built early during the claimed occupancy of the premises, and claimant does not show it to have been used sufficiently to entitle it to be considered valuable improvements." (Opinion, pp. 3 & 4.)

If built, it must have been at the cost of from $40 to $60, as the witnesses testify.

Was there such a road?

The testimony of claimant shows the existence to be a matter of personal knowledge and experience with each of them, and four speak respecting it.

Says A. Carr: "I cut a wagon road from 400 to 600 yards between ¼ and ½ of a mile from the county road to where my house is, from 8 to 15 feet wide; was over a week cutting that road." (Evidence, p. 78, last p't, & 79, first p't).

Says Job Carr: "We traveled to the house on the claim over the road we had built" (p. 168, last of).

415 "I helped work this road 3 different days" (p. 169, last part).

"I consider this road better than the average of woods roads" (p. 172, first part).

"It's a better road than I know of around there" (p. 144, first).

Says A. M. Mahon: "The road could not have been made for less than $50 or $60;" that he worked upon and hauled with a two-horse wagon over it 4 or 5 days (p. 145).

Geo. W. Byrd says: "He traveled in to the house upon this road and went *and went* out by same; thinks it near one-half mile long." He says: "It's a road running through heavy timber; it is a passable road; I can drive a wagon in and out that road; I thought at the time it was a very good road for a new road" (p. 136, last of, & 137, first of).

But the fact of this house of sawed material standing in that dense wilderness of timber is of itself proof of the existence of a road leading to it, for, says Hanzelman, contestant's own witness, "I don't believe the lumber could have been hauled in there without a road; it would have been impossible to have hauled that lumber in there with a two-horse wagon without a road of some kind having been made, at least in that woods; it is a very wild place; there were logs down every 20 steps" (p. 130, middle).

416 The opinion itself concedes that the presence of the house can only be accounted for in one of three ways:

1st. That there is a road.

2nd. By driving a wagon around logs and trees.

3rd. Taking material in by hand.

The above evidence of Hanzelman and other witnesses furnishes a complete answer to the 2nd hypothesis, while its inherent weakness refutes the 3rd.

Next, says the opinion, certain other improvements are alleged, the clearing of a small space and planting of some few fruit trees, "but admits a person might pass right through and not see any improvements."

What the claimant did say is but partially stated and so distorted by a system of emphasis that meaning is given not sanctioned by the true interpretation of the testimony.

What does Mr. Carr say relative to that matter? "I worked at this claim—I can't give the exact number of days; from 8 to 10, perhaps two weeks; worked there over a week; am certain my father worked here with me" (p. 71).

"I began and partly built a small cabin here. I also cut a part of a road" (p. 72).

I set out some small *fruit* trees, from 20 to 30 small *fruit* trees; could not have been less than 25; might have been 35 (p. 74).

417 Tore down the cabin to build up a plank house (p. 74, last of).

"I abandoned this place because I had a large hill to go up and come down in getting to and from it" (74, last of).

At this locality the ferns grow very rapidly and very large" (p. 75, middle of).

Sproul himself testifying that the growth is about 7 feet (p. 62, middle).

"State how near in your opinion a man might pass to that improvement and not see it."

"He might pass directly through it and not notice it on account of the fern and undergrowth" (p. 75, latter part).

Thus it appears the claimant made a small clearing, began a cabin, took it down, planted some small fruit trees, and on account of a bad hill abandoned this locality as a building spot.

The growth of fern and other vegetation was such that one passing *casually* over this place near two years after these improvements had been made might not have noticed them.

Now, when fairly seen, what is there in the circumstances or statement respecting it at variance at good faith?

418 Again, relative to the planting of potatoes, says *says* the opinion: "He admits it was on very poor ground, where nothing could grow, and was done to prove up on his claim." (Opinion, p. 4, latter part.) This imputed admission is not justified by the witnesse's testimony. Speaking of the general character of the claim in connection with the potatoes, he says: The ground is generally sandy and rocky and would not pay for cultivation (p. 98, first of).

Q. "Why did you plant your potatoes on poor, stony ground that would not grow them?"

A. "There was no good ground on the claim that I know of" (p. 117, latter p't).

Q. "What did you plant those potatoes for?"

A. "For the purpose of cultivation."

Q. "Was that purpose of cultivation to raise a crop or prove your claim in the land office?"

A. "Both" (p. 118).

Had any settler answered this question differenty he would not have spoken the entire truth, because every *bona fide* homestead settler plants with the intent to cultivate his land and for the pus-pose of bringing proof to the Government that he is acting in good faith, for otherwise his *bona fide* toil might fail of recognition.

The statement of the witness is frank and honorable; as miscon-
strued in the opinion it is *mala fide*. So in relation to grass
419 seed. During last winter and until April or May Carr kept
a cook stove in the house, when it was removed. (Opinion, p. 6, latter part.)

This was done in view of building a fire-place.

At this juncture, between the removing of the stove in April or May and the inception of this contest and following the robbery of the house (p. 89, latter part; 90, first of), when claimant, on going away, was compelled to hide his household effects and tools as protection from thieves, and when Mr. Carr had removed some boards from the end of the house (see p. 92, latter part) for the building of the chimney, contestant, Sproul, for the first time, while searching for land near what then gave promise of becoming the cite of a great city, comes on this claim and with his witnesses makes examination of the house, and from its then undone condition seeks to create an impression of it that may prove bad faith on the part of Carr.

The half-inch cracks are caused by the seasoning of the green boards (p. 84, first of); the 8-inch cracks by the removal of boards for the building of the chimney.

Says Mr. Carr: "I had the house closed in tight at first. I removed those boards to put in the fire-place" (p. 92, first part).

Materials for battens had been placed on the ground long
420 before, but were put on house about time of filing notice of
contest (p. 83, last of; 84, first of).

So the stone for completion of chimney had been gathered and placed in easy access before the filing of contest (p. 86).

No witness is offered to show the condition of the house from the time of its building to the time of contest except at this particular juncture and in this undone state; Sproul never saw the claim until June 1st.

Steele says his examinations of it were within six weeks of trial mostly and Hanzelman was taken there by Sproul.

All of these concede it to be such as common observation will prove to be superior to the houses of the majority of claimants who prove up before this land office.

We get some idea of the cost of the house when we refer to the evidence.

Mr. Mahon says: "I don't think I hauled less than from 500 to 700 feet at a load. This was with a two-horse team" (p. 143, middle of; p. 145, middle).

Job Carr says: I helped build the house; it is a plank house 14 by 18 feet, about a 9-foot story, with framed rafters and shaved-shingle roof, one door of dress timber—what we call a batten door—
421 one twelve-light window, 9 by 13 glass, and altogether a comfortable house to live in for a claim-house. I have seen many claim-houses, and it is 25 per cent. better than the average claim-house through the country. It is worth not less, under the circumstances, than one hundred dollars (pp., 162 and 163).

A. Carr as to same (p. 82, middle, and 83).

Here we have the actual description of the house by those who furnished the material and constructed it, while much of the testimony offered in contradiction of it is of such kind as the following:

M. C. Simmons: "I don't recollect seeing any other improvements than the house." "I went to the house, stepped in; did not take any particular notice of it so I could describe it," &c. (p. 24, first of).

Phillip Hanzelman says: "I did not examine the house carefully." "I did not measure the house." "I paid little attention to it" (p. 32, middle of).

Finally, the decision states that the evidence adduced shows claimant allowed Cilly to enter upon the claim, construct a regular logging road, and cut over a large space of ground, taking trees fit for lumber and leaving the conchus or defective ones, and that notwithstanding claimant was not a settler in good faith, &c. (See Opinion, page 6.)

What is the evidence respecting this charge?

Mr. Simmons, the only witness for contestant except him-
422 self, respecting the matter, says: "I went to see him (Mr. Carr) and asked him about the timber. He said he owned the place as a homestead and didn't think he had the right to sell the timber. Then I spoke and said I had seen a piece in the paper stating that a man could log off land he wanted to clear up. He said he believed he recollected of seeing the same and if I wanted to buy the timber (after studying over it awhile) I could have it for fifty cents a thousand, as he wanted to clear the land up." "We went in there on the understanding I have spoken of—that I was to have the timber at 50 cts., as he wanted to clear the land up" (p. 21).

We went in there on the understanding I have spoken of, that I was to have the timber at 50 cts. per M, as he wanted to clear the land up" (p. 22). "I quit; turned over the camp to a man by name of Watts Cilly. I took him down to Carr's and had him understand the contract the same as we had it" (p. 22, latter p't).

Mr. Carr says: "I would not sell it to him. I did not think I had a right to sell it and told him so, and he referred to an article in the newspapers which I had seen. I had started in to slash and

burn a piece of swale, good timber principally, and I did not see the difference whether I got the benefit from the timber or destroyed it by fire, and told him if I was certain I was not transgressing the law that he might cut and remove such timber as he wished to
423 take off at a specified price; the ballance I would slash and burn to clear it, as I was bound to slash and clear the land" (p. 98). "Did you show him the land?"

"I did; partially by the land and partially by the map."

"About how large and what kind of a tract was it?"

"I think it embraces some 10 or 15 acres, that I intended clearing; a clayey swale—a piece of upland ground—the largest piece of clay I know of on the ground" (p. 99).

"I told him not to cut except on that forty (where the 10 to 15 acre tract was). I told him I would rather he would wait till I had proved up, till my time was out, the 28th of June, and not cut any till then" (p. 100).

"Was it a part of the agreement that he was to give you any assistance in clearing that land? If so, state what."

"It was nothing definite; only in general terms that such logs as I couldn't handle easily or burn where they were he was to take the oxen and roll for me."

"State to the best of your knowledge how much land in area has been cut over."

"Don't think it is more than 7 or 8 acres; possibly ten" (p. 101).

"It was my intention to clear this land. I had started in to work on it to cut and burn. He run his log road over where I had been at work" (p. 102, first p't).

"Every stick cut is an advantage towards clearing it for
424 cultivation. The claim is not injured, but benefitted, by the cutting" (p. 103, latter part).

For the purpose of agriculture the claim is worth from $250 to $300 more without that timber than with it (p. 103).

"By REGISTER: Before you made the agreement with Mr. Cilly about logging, did you ask him for or obtain any official information as to your right to do so?"

"I asked a lawyer in Steilacoom and he told me I could. His name is Jacob Hoover" (p. 119, last of, and 120).

Contestant's own witness, as above seen, fails to impugn the good faith of Mr. Carr relative to the cutting of timber, but in all things confirms his good faith.

Contestant testifies he first came to the county where the land lies about 6 days before filing of contest (p. 200).

Now, it is plain the only evidence in this case to show bad faith in cutting timber is the opinion of this claim-jumper, Sproul, based on the fact that he was told that Mr. Carr had received 50 cts. a thousand for it. Upon this mere opinion of a man ignorant of the facts of the case and actuated by the covetous desire to rob Mr. Carr of his possession, and in direct conflict with the unmistakable showing of good faith by his own witness and Carr's own testimony to that effect, the land office finds adversity to claimant in the matter of cutting timber.

425 Contrary, as we think, to the entire weight of the testimony.

A careful examination of all the testimony, we feel assured, will satisfy this honorable court of the correctness of this *this* review.

J. B. AND J. S. ALLEN,
Attorneys for Anthony P. Carr.

426 DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May 5th*, 1874.

SIR: I have examined the case of Robert Sproul *vs.* Anthony P. Carr, contest under the 5th section of the homestead law, involving title to W. ½ N. E. ¼ and E. ½ N. W. ¼, section 8, T. 20 N., R. 3 E., Olympia, W. T., on appeal from your decision of October 16th, 1873, holding the entry of Carr for cancellation.

The record shows that for two years after his entry and up to the date of trial Carr, although he had a cabin and other small improvements on the land, was an actual resident of the village of Tacoma, several miles distant.

I therefore affirm your decision and return herewith the papers transmitted with your letter of January 31st, 1874.

Very respectfully, B. R. COWEN,
Acting Secretary.

Honorable Willis Drummond, Commissioner G. L. Office.

427 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Oct. 16th*, 1873.

Register & receiver at Olympia, Washington Territory.

GENTLEMEN: In the homestead act of 20th of May, 1862, there is in the 5th section a stipulation to the following effect: "That if at any time after the filing of the affidavit, as required in the second section of this act, and before the expiration of the five years aforesaid it shall be proven, after due notice to the settler, to the satisfaction of the register of the land office that the person having filed such affidavit shall have actually changed his or her residence or abandoned the said land for more than six months at any time, then and in that event the land so entered shall revert to the Government."

In view of that stipulation this office has had under consideration the case transmitted with your letter of the 4th ultimo, in which you have reported your decision that the party making the homestead, as hereinafter described, has forfeited his claim under the statute, and that said entry should be cancelled accordingly. The proceedings were based on the sworn allegations of other persons
428 that the lands embraced in the respective entries had been abandoned by the claimant "for more than six months," and your report shows that due notice was given by you to each of the parties interested of the time and place of trial.

This office, on a careful examination of the proceedings and tes-

timony, approves your decision, and immediately upon the receipt of this you will cause due notice to be brought home to the party that his entry has been adjudged forfeited, reposting to this office the fact that you have given the *the* notice of forfeiture, and that he will be allowed sixty days in which to file an appeal from this decision.

If filed, you will transmit the same to this office.

If no appeal is taken, you will notify us of the fact. The entry will then be cancelled by this office and you will be so advised.

The case referred to in the foregoing, *as* on which you have awarded forfeiture and this office has affirmed your decision, is the following:

No. 1368, Anthony P. Carr, made June 28th, 1871, for W. ½ N. E. ¼ & E. ½ of N. W. ¼ of sec. 8, — 20 north, 3 east.

Respectfully yours, WILLIS DRUMMOND,
Commissioner.

429 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
M. M. D. T. P. WASHINGTON, D. C., *May 9th*, 1874.

Register & receiver, Olympia, W. T.

GENTLEMEN: I enclose herewith a copy of the decision of the honorable acting Secretary of the Interior Department, affirming the decision of this office in the matter of the cancellation of homestead entry No. 1368, made by Anthony P. Carr June 28th, 1871, for the W. ½ of N. E. ¼ & E. ½ of N. W. ¼ of section 8, T. 20 north, of R. 3 east.

I have this day canceled said entry on the files and records of this office, and you will therefore make the proper annotations on the records of your office.

You will furnish the interested parties a copy of the enclosed decision.

Very respectfully, W. W. CURTIS,
Acting Commissioner.

430 (Endorsed:) In dist. c't. Carr *vs.* Fife *et al.* Def'ts' Exhibit 1. C. B. Eaton, referee. Filed Nov. 26th, 1888. A. Reeves Ayres, clerk, by L. O. Abbott, deputy clerk. Filed June 30th, 1890. A. Reeves Ayres, clerk.

431 In Dist. Ct.

CARR
vs.
FIFE *et al.*

DEF'TS' EXHIBIT 2. C. B. Eaton, Referee.

432 In the District Court of the Third Judicial District of the Territory of Washington, Holding Terms at New Tacoma, in and for the County of Pierce.

433 In the District Court of the Third Judicial District, Holding terms at New Tacoma, Pierce County, Washington Territory.

ANTHONY P. CARR, Plaintiff,
vs.
THE TACOMA LAND COMPANY and LAKE SUPERIOR AND PUGET SOUND COMPANY, Defendants.
} Amended Complaint.

To the Hon. R. S. Greene, judge of the third judicial district, county of Pierce, Washington Territory:

Comes now the above plaintiff and by leave of the court first had and obtained, files his amended complaint ("making The Lake Superior and Puget Sound Company" a party defendant herein) and complains of the above-named defendants, and for cause of action alleges and shows to the court, to wit:

First.

That the defendant The "Tacoma Land Company" is a corporation duly organized and acting under and by virtue of the laws of the State of Pennsylvania, and doing business in Pierce county, Washington Territory.

Second.

That the defendant The "Lake Superior and Puget Sound
434 Company" is a corporation duly organized and acting under and by virtue of the laws of the State of Maine, and doing business in Pierce county, Washington Territory.

Third.

That the plaintiff A. P. Carr for more than eight years last past, has been, and now is, the owner in fee simple, absolute and in the actual notoricus possession of all that certain piece or parcel of land lying and being situate in the county of Pierce, Washington Territory, and more particularly described as follows: Being the southwest quarter of the northwest quarter of section thirty-two, (32) township twenty-one (21) north of range three (3) east, W. M.

Fourth.

That the said defendants unjustly give out and pretend to claim some estate, right, title or interest in and to said above-described land, adverse to the title of this plaintiff therein, and that such claims so given out and pretentions have no valid foundation whatever, either in law or equity, but that the same are injurious to and a cloud upon the title of this plaintiff.

Fifth.

That the sources from which the said defendants pretend to claim some estate or interest in said land, are by and through a certain conditional deed of trust of the land above described, made, executed and delivered by this plaintiff and his wife to one L. M. Starr in trust for the Northern Pacific Railroad Company, and dated November fourteenth A. D. 1872, and record*ing* in the office of the county auditor of Pierce county, Washington Territory, on the ninth day of January A. D. 1873, also by deed of the aforesaid premises by the said L. M. Starr to one Robert M. Thompson in trust, dated July fourteenth A. D. 1873, and filed and recorded in the auditor's office of Pierce county, Washington Territory, on the
435 fourteenth day of July A. D. 1873, also by deed of same premises from said Robert R. Thompson to the above defendant The "Tacoma Land Company" made, executed and delivered, Feb'y fourteenth A. D. 1874, and recorded in the auditor's office of Pierce county, Washington Territory, on the twenty-fifth day of February A. D. 1874, and also by deed of an undivided one-third interest in the aforesaid premises from the "Tacoma Land Company" to the above defendant, The "Lake Superior and Puget Sound Company," said deed bearing date February twentieth A. D. 1874 and recorded in the auditor's office of Pierce county, Washington Territory.

Sixth.

That the trust deed aforesaid made and executed by this plaintiff and wife, to the said L. M. Starr provided that before the said Northern Pacific Railroad Company shall be entitled to a deed from said trustee L. M. Starr to said premises, said Northern Pacific Railroad Company should faithfully carry out, do, and perform among other things, the following express conditions: expressly mentioned and set forth in said trust deed and expressly enjoined upon said company to do and perform, to wit:

First. That the said Northern Pacific Railroad Company should on or before the first day of April A. D. 1873, locate, or cause to be located, a line of railroad connecting the navigable waters of "Commencement bay" in Pierce county, Washington Territory, with the Columbia river.

Second. That the said company should on or before the first day of April A. D. 1873, signify in writing its acceptance of the proposals, and agree to comply with the conditions of said trust deed therein set forth.

Third. That if the said company or its assigns did not perform the said conditions in the manner and at the times aforesaid, the said trustee should immediately after failure to perform either of said conditions, reconvey the said land to the said plaintiff.

436 Seventh.

That said trust deed from this plaintiff to the said L. M. Starr was without any other consideration whatever except the conditions therein contained.

Eighth.

That the said Northern Pacific Railroad Company did not by its self or assigns perform or pretend to perform either of the aforesaid conditions so expressly set forth in said deed of trust, or signify its acceptance in writing of the proposal contained in said trust deed, on or before the first day of April A. D. 1873.

Ninth.

That on the 24th day of May A. D. 1873 this plaintiff did in writing agree with the said L. M. Starr, trustee aforesaid, to extend the time for the Northern Pacific Railroad Company to perform the first and fourth conditions in said trust deed mentioned, up to the first day of July A. D. 1873, but that the said railroad company did not do or perform or pretend to perform either of said conditions last aforesaid at or before the first day of July A. D. 1873.

Tenth.

That on the third day of July A. D. 1873, for and in consideration of the sum of one dollar to this trustee, L. M. Starr, in hand paid, the said L. M. Starr, made, executed and delivered to this plaintiff a quitclaim deed of the aforesaid premises in compliance with his agreement to reconvey as set forth in said trust deed to said Starr, which said deed was filed and recorded in the office of the auditor of Pierce county, Washington Territory, on the 5th day of July A. D. 1873.

Eleventh.

That the deed from L. M. Starr to said Thompson and from said Thompson to this defendant The "Tacoma Land Company" and of an undivided one-third interest in said premises, by the said
437 Tacoma Land Company to the defendant The "Lake Superior and Puget Sound Company" were made, executed and recorded subsequent to the said quitclaim deed from said L. M. Starr to this plaintiff.

Wherefore plaintiff prays, that said defendant may be summoned to answer this complaint, and that in their answer said defendants be required to set forth what estate, right, title or interest if any they have, in said above-described premises, that the same may be inquired into and here determined by the decree and judgement of this court.

That said plaintiff may by the judgment and decree of this court, be declared to be the owner in fee simple, absolutely and rightfully, lawfully and equitably in the possession of the said tract of land and the whole thereof.

That the said defendants and their assigns or successors, may be by the judgement and decree of this court, declared to have no estate, right, title or interest either in law or equity in and to said land or any part thereof.

And that defendants, their successors or assigns, may by the judgement and decree of this court, be perpetually enjoined from demanding or claiming any right, title or interest in said tract of land or any part thereof, in any court of law or equity either in this Territory or elsewhere, and that plaintiff have judgement for his costs and disbursements herein laid out and expended, and that execution may issue for the same, and for such other and further relief as may to the court seem just and equitable, and plaintiff will ever pray.

CAMPBELL, BASHFORD & CAMPBELL,
With whom is CHAS. N. SENTER, *Att'ys for Plaintiff.*

438 TERRITORY OF WASHINGTON, } *ss:*
County of Pierce, }

A. P. Carr being first duly sworn on oath says, that he is the plaintiff in the foregoing action. That he has read the foregoing amended petition, and knows the contents thereof, and that the allegations therein are true as he verily believes.

A. P. CARR.

Subscribed and sworn to before me this 10th day of May A. D. 1882.

F. W. BASHFORD,
Notary Public, Pierce County, W. T.

In the District Court of the Third Judicial District of the Territory of Washington, Holding Terms at New Tacoma, in and for the County of Pierce. In Equity.

ANTHONY P. CARR, Plaintiff,
vs.
THE TACOMA LAND COMPANY AND LAKE SUPERIOR AND PUGET SOUND COMPANY, Defendants.
No. 329.
Amended Answer.

Comes now the above-named defendant The Tacoma Land Company, and by leave of court first had and obtained, for an amended answer to the amended complaint of the plaintiff filed herein on the sixteenth day of May A. D. 1882 respectfully shows:

Denials.

First.

I. This defendant denies each and every allegation in the third paragraph of said amended complaint contained.

439 Second.

II. This defendant denies each and every allegation in the fourth paragraph of said amended complaint contained, except that this defendant claims estate, right, title and interest in and to the lands described in said complaint adversely to plaintiff's claim of title thereto.

Third.

III. This defendant denies each and every allegation in the ninth paragraph of said complaint contained, following the words and figures: "up to the first day of July A. D. 1873."

Fourth.

IV. This defendant denies each and every allegation in the tenth paragraph of said complaint contained, except that on the third day of July A. D. 1873 L. M. Starr signed, sealed and acknowledged a pretended quitclaim deed to the plaintiff of the premises in controversy, which said quitclaim deed was on the fifth day of July A. D. 1873 recorded in the office of the auditor of said county of Pierce.

Defense.

And for a further defense this defendant alleges:

First.

V. That before the filing of said amended complaint, and on or about the eighteenth day of November A. D. 1875, the plaintiff, pretending to be the owner of the premises in controversy in this suit, executed and delivered to one Justa L. Lewis a pretended deed of conveyance purporting to convey to said Justa L. Lewis a certain portion of said premises described in said pretended deed
440 as follows: "Commencing at the northwest corner of the southwest quarter of the northwest quarter of section thirty-two, town. twenty-one, north, range three east, Willamette meridian, running thence south twenty (20) rods, thence east sixteen (16) rods, thence north twenty (20) rods, thence west sixteen (16) rods, to place of beginning, containing two acres."

VI. That before the finding of said amended complaint, and on or about the twenty-seventh day of September A. D. 1881, the said Justa L. Lewis having between the date of the said pretended conveyance and the last-mentioned date intermarried with one Samuel E. Stone, the said Samuel E. Stone and Justa L. Stone his said wife executed and delivered to one Andrew Miller a pretended deed of conveyance purporting to convey to the said Andrew Miller the said two acres of land last above described.

Second.

And for a further and second defense this defendant alleges:

VII. That heretofore and subsequently to the twenty-eighth day

of June A. D. 1875, but at what precise date this defendant is not advised, the plaintiff, pretending as aforesaid to be the owner of the portion of the premises in controversy remaining after the said pretended conveyance to the said Justa L. Lewis, made and entered into a pretended contract with one Louis Caldwell whereby said plaintiff agreed to convey to said Caldwell a certain one acre of said remaining portion of the premises in controversy, which said one acre this defendant is informed and believes is described as follows:

441 Commencing at a point twenty rods south of the northwest corner of the southwest quarter of the northwest quarter of section number thirty-two (32) in township number twenty-one (21) north, of range three (3) east of the Willamette meridian, and running thence east eight rods, thence south twenty rods, thence west eight rods, thence north twenty rods, to the place of beginning.

Third.

And for a further and third defense this defendant alleges:

VIII. That the instrument referred to in the tenth paragraph of said amended complaint as a quitclaim deed was executed by the said L. M. Starr upon the understanding and agreement then and there—to wit: on the third day of July A. D. 1873, in said county of Pierce—had by and between the plaintiff Anthony P. Carr and the said L. M. Starr that if the said L. M. Starr would execute and deliver to the plaintiff a quitclaim deed of the premises in controversy the said plaintiff would simultaneously with the execution and delivery of such quitclaim deed to him execute and deliver to one Robert R. Thompson as trustee for the Northern Pacific Railroad Company a deed of trust conveying said premises to said Robert R. Thompson as such trustee, to have and to hold the same upon trust for the sole use and benefit of the said Northern Pacific Railroad Company, to be by him conveyed to such person or persons, corporation or corporations then existing or thereafter to be formed, as he the said Robert R. Thompson should by the Northern Pacific Railroad Company or its lawful agents be thereunto requested, in fee simple.

IX. That in pursuance of said understanding and agreement between the plaintiff and said L. M. Starr a printed blank

442 form of deed such as had theretofore been and then was in use by the said Northern Pacific Railroad Company in receiving conveyances of land to the said Robert R. Thompson in trust for said company was delivered on behalf of the said company and of the said L. M. Starr to one Job Carr, the father of the plaintiff Anthony P. Carr, with the request that he the said Job Carr fill up the said blank with the names of said Anthony P. Carr and Josephine Carr his wife as grantors and with the description of the premises in controversy, and take the same to the said Anthony P. Carr and his said wife, to be by them executed to the said Robert R. Thompson as trustee as aforesaid, and at the same time the said quitclaim deed was delivered on behalf of said L. M. Starr to said Job Carr, to be by him delivered to the plaintiff upon the execution

by the plaintiff and wife to the said Robert R. Thompson as trustee as aforesaid of said deed of trust conveying as aforesaid the premises in controversy and delivery thereof by plaintiff and wife to one George E. Atkinson for and in behalf of said Thompson, trustee, and upon the understanding and agreement with the said Job Carr that in case of the failure of the plaintiff and wife to execute and deliver the said deed of trust as aforesaid to the said Robert R. Thompson as trustee as aforesaid the said quitclaim deed should forthwith and on the same day be returned and delivered up to the said L. M. Starr or to the said George E. Atkinson in his behalf.

X. That the said Job Carr, disregarding the said request to him in this behalf, filled up the said printed blank form of deed of trust to the said Robert R. Thompson as trustee as aforesaid with
443 the description of the following-described tract of land situated in the said county of Pierce, namely: "The northwest quarter of the southeast quarter of section eight (8) in township twenty (20) north, of range three (3) east of the Willamette meridian, containing forty (40) acres more or less according to the United States survey," instead of filling up said printed blank form of deed of trust with the description of the premises in controversy described in the said quitclaim deed so delivered to the said Job Carr as aforesaid; and the said plaintiff Anthony P. Carr on the said third day of July A. D. 1873 executed and procured to be executed by his said wife the said deed of trust so falsely filled up by the said Job Carr with the description last hereinabove recited, instead of executing to said Thompson as trustee as aforesaid a deed of trust of the premises in controversy described in said quitclaim deed, and immediately after the execution of such deed of trust handed the same to the said George E. Atkinson without the knowledge of the said Atkinson that the same contained the said false description instead of the description of the premises in controversy, in pretended compliance with the said understanding and agreement by and between the said plaintiff and the said L. M. Starr upon which the said quitclaim deed was executed by the said Starr and delivered to the said Job Carr as aforesaid.

XI. That immediately after handing to the said George E. Atkinson as aforesaid the said spurious deed of trust filled up with the said false description as aforesaid the said plaintiff seized and took into his possession the said quitclaim deed from a table in the house of the plaintiff whereon the same was then lying (having
444 been laid thereon by the said Job Carr) in the full view and control of the said George E. Atkinson, and then immediately thereafter snatched from the hand of said Atkinson the said spurious deed of trust to the said Robert R. Thompson, trustee, mutilating the same in the struggle to wrest the possession thereof from said Atkinson, who strove to retain such possession; whereupon the said Atkinson, believing that the said spurious trust deed contained the description of the premises here in controversy according to the aforesaid understanding and agreement between the plaintiff and said L. M. Starr, demanded that the plaintiff return the same to him the said Atkinson or else surrender up to him the said quitclaim

deed of the said L. M. Starr to the plaintiff; but the plaintiff refused to do either, and fraudulently retained in his possession both of said deeds.

XII. That the said quitclaim deed so as aforesaid seized, taken into possession and fraudulently retained by plaintiff, and which said deed was on the fifth day of July A. D. 1873 filed for record by plaintiff and is recorded in the office of the auditor of the said county of Pierce at page 29 of volume 4 of Deeds, records of said county, is the sole source by, through, or from which the plaintiff claims title to the premises in controversy or any part thereof.

Fourth.

And for a further and fourth defense this defendant alleges:

XIII. That the said quitclaim deed of the third day of July A. D. 1873 was not executed by the said L. M. Starr in his character as trustee under the said deed of trust of the fourteenth day of November A. D. 1872 referred to in the fifth paragraph of plaintiff's said amended complaint.

445

Fifth.

And for a further and fifth defense this defendant alleges:

XIV. That prior to the execution of said quitclaim deed of the third day of July A. D. 1873 by the said L. M. Starr to the plaintiff, and on and before the first day of July A. D. 1873, the said Northern Pacific Railroad Company had fully performed and complied with each and all of the conditions of the said trust deed of November 14th A. D. 1872 from the plaintiff to said L. M. Starr, trustee, which it was by the terms of said trust deed and of the extension of the time therein named by the instrument in writing of the 24th day of May A. D. 1873 referred to in the ninth paragraph of said amended complaint required to perform and comply with up to and including the first day of July A. D. 1873; and the said L. M. Starr as trustee under said trust deed had recognized and decided that the said Northern Pacific Railroad Company had so as aforesaid fully performed and complied with each and all of said conditions.

Sixth.

And for a further and sixth defense this defendant alleges:

XV. That the said Northern Pacific Railroad Company fully performed in the manner and within the time therein specified each and all of the conditions of the said trust deed of November 14th A. D. 1872 which were by the terms thereof to be performed by said company after the first day of July A. D. 1873.

Seventh.

And for a further and seventh defense this defendant alleges:

XVI. That other sources from and through which this
446 defendant claims title in fee simple to the premises in con-

troversy besides the sources named in the fifth paragraph of plaintiff's said amended complaint are the following, namely:

(1.) A certain instrument in writing which was executed by plaintiff and his said wife to the said L. M. Starr as trustee under the said deed of trust of November 14th A. D. 1872 on the twenty-fourth day of May A. D. 1873 in and by which said plaintiff and wife extended the time for the performance by the said Northern Pacific Railroad Company of the first and fourth conditions of said trust deed to the first day of July A. D. 1873; which said instrument was filed for record in the office of the auditor of the said county of Pierce on the sixth day of June A. D. 1873 and is recorded at page 755 of volume 3 of Deeds, records of said county; and also,

(2.) A certain deed which was executed by the said L. M. Starr as trustee under the said trust deed of November 14th A. D. 1872 to this defendant on the twenty-second day of February A. D. 1875 by the terms whereof the said L. M. Starr as trustee as aforesaid conveyed to this defendant in fee simple the premises in controversy; which said deed was filed for record in the office of the auditor of said county of Pierce on the twenty-eighth day of June A. D. 1875 and is recorded at page 768 of volume 4 of Deeds, records of said county; and also,

(3.) A certain deed which was executed by the defendant The Lake Superior and Puget Sound Company to this defendant on the twenty-sixth day of May A. D. 1882, whereby the said Lake Superior and Puget Sound Company conveyed all its right, title and
447 interest in and to the premises in controversy to this defendant; which said deed was filed for record in the office of the auditor of the said county of Pierce on the twelfth day of June A. D. 1882, and is recorded at pages 484 and 485 of volume 10 of Deeds, records of said county.

Counter-claim.

And for a further defense and counter-claim herein against the said plaintiff Anthony P. Carr this defendant respectfully shows:

XVII. That on or about the fourteenth day of November A. D. eighteen hundred and seventy-two in the county of Pierce and Territory of Washington said plaintiff together with his wife Josephine Carr made, executed, duly acknowledged and delivered to one L. M. Starr a certain deed of trust bearing date as of the said 14th day of November A. D. 1872, which said deed was on the ninth day of January A. D. 1873 filed for record in the office of the auditor of said county and is recorded at page number 624 of volume 3 of Deeds, records of said county.

XVIII. That in and by said deed of trust the said plaintiff and his said wife granted and conveyed to the said L. M. Starr, as trustee, the following-described tract of land situated in the said county of Pierce, to wit: The southwest quarter of the northwest quarter of section number thirty-two (32) in township number twenty-one (21) north, of range three (3) east of the Willamette meridian, containing forty (40) acres of land, upon trust to convey the same in fee

simple to the Northern Pacific Railroad Company, a corporation duly created, organized and existing under and by virtue of an act of Congress of the United States, or to such party or parties as might be designated by said company when the said company or
448 its assigns should have performed four (4) certain conditions recited and set forth in said deed of trust as follows, that is to say:

"1st. That said company shall on or before the first day of April A. D. 1873 locate or cause to be located a line of railroad connecting the navigable waters of Commencement bay in Pierce county, Washington Territory, with the Columbia river.

"2nd. Said company shall on or before the 1st day of January A. D. 1875 construct, equip or cause to be constructed and equipped, and operate said line of road.

"3rd. The said company shall immediately upon the completion of said road locate and build, or cause to be located and built, within one-half mile of said Commencement bay a good and sufficient passenger and freight depot on the line of said road, and shall maintain the same.

"4th. The said company shall on or before the first day of April A. D. 1873 signify in writing its acceptance of this proposal and agree to comply with the foregoing conditions."

XIX. That the said trust deed also contained a proviso in the words following, to wit: "Provided, that if said company or its assigns shall not perform said conditions in the manner and at the time herein mentioned said trustee shall immediately after the failure to perform either of said conditions reconvey said land to said Carr, his heirs or assigns."

XX. That on or about the twenty-fourth day of May A. D. 1873 the said Anthony P. Carr and Josephine Carr his wife made, executed and delivered to the said L. M. Starr, as trustee as aforesaid, a certain instrument in writing under their hands and seals, which said instrument was on the fourth day of June A. D. 1873 duly acknowledged by the said Anthony P. Carr and his said wife and was on the sixth day of June A. D. 1873 filed for record in the office of the said county auditor, and is recorded at page 755 of volume 3 of Deeds, records of said county.

449 XXI. That in and by the said instrument of May 24th, A. D. 1873 the said Anthony P. Carr and wife did extend the time for the performance by the said Northern Pacific Railroad Company of the first and fourth recited conditions of said trust deed of November 14th A. D. 1872 to the first day of July A. D. 1873.

XXII. That before the said first day of July A. D. 1873 the said Northern Pacific Railroad Company did perform the said first-recited condition of said trust deed.

XXIII. That before the first day of July A. D. 1873 and on the thirtieth day of June A. D. 1873, the said Northern Pacific Railroad Company did perform the said fourth-recited condition of said trust deed.

XXIV. That on and before the said first day of July A. D. 1873,

troversy besides the sources named in the fifth paragraph of plaintiff's said amended complaint are the following, namely:

(1.) A certain instrument in writing which was executed by plaintiff and his said wife to the said L. M. Starr as trustee under the said deed of trust of November 14th A. D. 1872 on the twenty-fourth day of May A. D. 1873 in and by which said plaintiff and wife extended the time for the performance by the said Northern Pacific Railroad Company of the first and fourth conditions of said trust deed to the first day of July A. D. 1873; which said instrument was filed for record in the office of the auditor of the said county of Pierce on the sixth day of June A. D. 1873 and is recorded at page 755 of volume 3 of Deeds, records of said county; and also,

(2.) A certain deed which was executed by the said L. M. Starr as trustee under the said trust deed of November 14th A. D. 1872 to this defendant on the twenty-second day of February A. D. 1875 by the terms whereof the said L. M. Starr as trustee as aforesaid conveyed to this defendant in fee simple the premises in controversy; which said deed was filed for record in the office of the auditor of said county of Pierce on the twenty-eighth day of June A. D. 1875 and is recorded at page 768 of volume 4 of Deeds, records of said county; and also,

(3.) A certain deed which was executed by the defendant The Lake Superior and Puget Sound Company to this defendant on the twenty-sixth day of May A. D. 1882, whereby the said Lake Superior and Puget Sound Company conveyed all its right, title and
447 interest in and to the premises in controversy to this defendant; which said deed was filed for record in the office of the auditor of the said county of Pierce on the twelfth day of June A. D. 1882, and is recorded at pages 484 and 485 of volume 10 of Deeds, records of said county.

Counter-claim.

And for a further defense and counter-claim herein against the said plaintiff Anthony P. Carr this defendant respectfully shows:

XVII. That on or about the fourteenth day of November A. D. eighteen hundred and seventy-two in the county of Pierce and Territory of Washington said plaintiff together with his wife Josephine Carr made, executed, duly acknowledged and delivered to one L. M. Starr a certain deed of trust bearing date as of the said 14th day of November A. D. 1872, which said deed was on the ninth day of January A. D. 1873 filed for record in the office of the auditor of said county and is recorded at page number 624 of volume 3 of Deeds, records of said county.

XVIII. That in and by said deed of trust the said plaintiff and his said wife granted and conveyed to the said L. M. Starr, as trustee, the following-described tract of land situated in the said county of Pierce, to wit: The southwest quarter of the northwest quarter of section number thirty-two (32) in township number twenty-one (21) north, of range three (3) east of the Willamette meridian, containing forty (40) acres of land, upon trust to convey the same in fee

simple to the Northern Pacific Railroad Company, a corporation duly created, organized and existing under and by virtue of an act of Congress of the United States, or to such party or parties as might be designated by said company when the said company or
448 its assigns should have performed four (4) certain conditions recited and set forth in said deed of trust as follows, that is to say:

"1st. That said company shall on or before the first day of April A. D. 1873 locate or cause to be located a line of railroad connecting the navigable waters of Commencement bay in Pierce county, Washington Territory, with the Columbia river.

"2nd. Said company shall on or before the 1st day of January A. D. 1875 construct, equip or cause to be constructed and equipped, and operate said line of road.

"3rd. The said company shall immediately upon the completion of said road locate and build, or cause to be located and built, within one-half mile of said Commencement bay a good and sufficient passenger and freight depot on the line of said road, and shall maintain the same.

"4th. The said company shall on or before the first day of April A. D. 1873 signify in writing its acceptance of this proposal and agree to comply with the foregoing conditions."

XIX. That the said trust deed also contained a proviso in the words following, to wit: "Provided, that if said company or its assigns shall not perform said conditions in the manner and at the time herein mentioned said trustee shall immediately after the failure to perform either of said conditions reconvey said land to said Carr, his heirs or assigns."

XX. That on or about the twenty-fourth day of May A. D. 1873 the said Anthony P. Carr and Josephine Carr his wife made, executed and delivered to the said L. M. Starr, as trustee as aforesaid, a certain instrument in writing under their hands and seals, which said instrument was on the fourth day of June A. D. 1873 duly acknowledged by the said Anthony P. Carr and his said wife and was on the sixth day of June A. D. 1873 filed for record in the office of the said county auditor, and is recorded at page 755 of volume 3 of Deeds, records of said county.

449 XXI. That in and by the said instrument of May 24th, A. D. 1873 the said Anthony P. Carr and wife did extend the time for the performance by the said Northern Pacific Railroad Company of the first and fourth recited conditions of said trust deed of November 14th A. D. 1872 to the first day of July A. D. 1873.

XXII. That before the said first day of July A. D. 1873 the said Northern Pacific Railroad Company did perform the said first-recited condition of said trust deed.

XXIII. That before the first day of July A. D. 1873 and on the thirtieth day of June A. D. 1873, the said Northern Pacific Railroad Company did perform the said fourth-recited condition of said trust deed.

XXIV. That on and before the said first day of July A. D. 1873,

and thereafterwards and until about the fourteenth day of February A. D. 1874 inclusive, one Robert R. Thompson, at the request of said Northern Pacific Railroad Company, acted as trustee for said company in receiving conveyances of land in said county of Pierce and holding the same in trust for said company, to be by him conveyed to said company or to such party or parties as it might designate, upon the location and building of the said line of railroad connecting the navigable waters of said Commencement bay with the Columbia river; and that on or about the fourteenth day of July A. D. 1873 the said L. M. Starr, trustee, being anxious to be relieved of the duties and responsibilities of his said trust under the said deed of trust of November 14th A. D. 1872 and with the consent of said Robert R. Thompson, trustee as aforesaid, executed, duly acknowledged and delivered to said Thompson, trustee, a certain deed of trust bearing date as of the said 14th day of July A. D. 1873, which said deed was on the same day filed for record in the office of said county auditor and is recorded at pages numbers 66 and 67 of volume 4 of Deeds, records of said county.

450 XXV. That the said last-mentioned deed of trust was in terms a deed from said L. M. Starr as trustee under said trust deed of November 14th A. D. 1872 conveying to said Robert R. Thompson, trustee, the said premises hereinbefore and in said trust deed of November 14th A. D. 1872 described, upon trust to hold the same for the sole use and benefit of said Northern Pacific Railroad Company and to be by him conveyed to such person or persons, corporation or corporations then existing or thereafter to be formed, as he should by said Northern Pacific Railroad Company or its lawful agents be thereunto requested.

XXVI. That said Northern Pacific Railroad Company did before the first day of January A. D. 1875, and upwards of a year prior thereto, and on the thirty-first day of December A. D. 1873, perform the said second-recited condition of said trust deed of November 14th A. D. 1872, and has ever since continued to operate the line of railroad mentioned in said condition.

XXVII. That said Northern Pacific Railroad Company did before the first day of January A. D. 1875, and upwards of a year prior thereto, and on or about the said 31st day of December A. D. 1873, perform the said third-recited condition of said trust deed and has ever since maintained the said passenger and freight depot mentioned in said condition.

XXVIII. That thereupon—to wit: on the said thirty-first day of December A. D. 1873—the said Northern Pacific Railroad Company, having performed the said four conditions of said trust deed of November 14th A. D. 1872 as aforesaid, became and was entitled to a conveyance in fee simple of the premises hereinbefore and in said trust deed described to itself or to such person or corporation as it might designate.

XXIX. That between the said first day of July A. D. 1873 and the fourteenth day of February A. D. 1874 the said Northern Pacific Railroad Company did designate this defendant as the cor-

451 poration to which the said premises hereinbefore and in said

trust deeds of November 14th A. D. 1872 and July 14th A. D. 1873 described should be conveyed under the terms of said trust deed of November 14th A. D. 1872, and requested the said Robert R. Thompson, as trustee as aforesaid, to convey said premises to this defendant under the terms of said trust deed of July 14th A. D. 1873; and that thereupon and by force and virtue of said designation this defendant on the said fourteenth day of February A. D. 1874 became and was entitled to a conveyance of the said premises to itself in fee simple.

XXX. That on or about the said fourteenth day of February A. D. 1874 the said Robert R. Thompson as trustee as aforesaid by virtue and in pursuance of the said trust deed of November 14th A. D. 1872, the said trust deed of July 14th A. D. 1873, the performance by the said Northern Pacific Railroad Company of the said four conditions of the said first-mentioned trust deed, and the said designation of this defendant by the said Northern Pacific Railroad Company, and in compliance with the said request of said Northern Pacific Railroad Company thereunto, did duly execute, acknowledge and deliver to this defendant a certain deed of conveyance bearing date as of the said fourteenth day of February A. D. 1874, which said deed was on the twenty-fifth day of February A. D. 1874 filed for record in the office of the said county auditor and is recorded at pages 339, 340 and 341 of volume 4 of Deeds, records of said county.

XXXI. That the said last-mentioned deed was in terms a deed from the said Robert R. Thompson as trustee under the said trust deed of July 14th A. D. 1873 conveying to this defendant, with other premises, the said premises hereinbefore and in said trust deed described, in fee simple.

XXXII. That on or about the twenty-second day of February A. D. 1875 the said L. M. Starr as trustee as aforesaid, by virtue and in pursuance of said trust deed of November 14th A. D. 1872,
452 the performance by said Northern Pacific Railroad Company of the said four conditions of said trust deed, and the said designation of this defendant by the said Northern Pacific Railroad Company, and in compliance with a request which was then made to him by said Northern Pacific Railroad Company thereunto, did duly execute, acknowledge and deliver to this defendant a certain deed of conveyance bearing date as of the said 22d day of February A. D. 1875, which said deed was on the twenty-second day of June A. D. 1875 filed for record in the office of the said county auditor and is recorded at page 768 of volume 4 of Deeds, records of said county.

XXXIII. That the said last-mentioned deed was in terms a deed from the said L. M. Starr as trustee under the said trust deed of November 14th A. D. 1872 conveying to this defendant the said premises hereinbefore and in said trust deed described in fee simple.

XXXIV. That by virtue of the said several deeds, acts, matters and things hereinbefore alleged and set forth this defendant became and was seized and possessed in fee simple of the said premises hereinbefore and in said trust deed of November 14th A. D. 1872, de-

scribed, and has ever since continued to be and now is the owner thereof in fee simple and in the possession thereof,—except that from about the twentieth day of February A. D. 1874 to or about the twenty-sixth day of May A. D. 1882 the defendant The Lake Superior and Puget Sound Company was by conveyance from this defendant the owner and possessor of the one undivided third part of said premises, which said one undivided third part of said premises was on or about the said twenty-sixth day of May A. D. 1882 reconveyed by said Lake Superior and Puget Sound Company to this defendant in fee simple, by a certain deed which was then duly executed, acknowledged and delivered by said Lake Superior and Puget Sound Company to this defendant, which said deed, bearing date as of said 26th day of May A. D. 1882, was on the twelfth day of June A. D. 1882 filed for record in the office of the said
453 county auditor and is recorded at pages 484 and 485 of volume 10 of Deeds, records of said county.

XXXV. That the said plaintiff Anthony P. Carr, although fully advised of the said estate and title of this defendant in and to said premises, falsely claims and pretends that he is the owner in fee simple of said premises and entitled to the possession thereof. That, acting upon his said pretensions, the said Carr has at divers times since the twenty-eighth day of June A. D. 1875 and since the execution and delivery of the said deed of the said L. M. Starr, trustee, to this defendant as aforesaid, executed divers pretended deeds to various persons of divers and sundry parcels of said premises, and has brought the above-entitled suit against this defendant, alleging that he is entitled to said premises under and by virtue of a certain pretended quitclaim deed from the said L. M. Starr to him bearing date as of the third day of July A. D. 1873, being the same quitclaim deed referred to in the tenth paragraph of his said amended complaint, which said quitclaim deed the said Carr claims and pretends was made and executed by the said L. M. Starr in compliance with the terms of said trust deed of November 14th A. D. 1872 and because and by reason of the pretended failure of the said Northern Pacific Railroad Company to perform the said first and fourth recited conditions of the said trust deed and for the purpose of reconveying the said premises to said Carr in consequence of said pretended failure.

XXXVI. That the said quitclaim deed was not made and executed by the said L. M. Starr in compliance with the terms of said trust deed of November 14th A. D. 1872, or because or by reason of any failure of the said Northern Pacific Railroad Company to perform the said first and fourth recited conditions of the said trust deed, or for the purpose of reconveying the said premises to the said Carr in consequence of any such pretended failure; and that the said pretended quitclaim deed was never delivered by the said L. M. Starr, as trustee or otherwise to the said Carr.

454 XXXVII. That the said quitclaim deed of July 3rd A. D. 1873 was signed, sealed and acknowledged by the said L. M. Starr upon the understanding and agreement then and there had and made by and between the said Anthony P. Carr and the said

L. M. Starr that if he the said Starr would execute and deliver the said quitclaim deed to said Carr he the said Carr would simultaneously with the execution and delivery of said quitclaim deed to him execute and deliver to said Robert R. Thompson, hereinbefore mentioned, as trustee for said Northern Pacific Railroad Company a deed of trust conveying the said premises described in said quitclaim deed to the said Robert R. Thompson as trustee, to have and to hold the same upon trust for the sole use and benefit of the said Northern Pacific Railroad Company and to be by him conveyed to such person or persons, corporation or corporations then existing or thereafter to be formed, as he the said Thompson should by said Northern Pacific Railroad Company or its lawful agents be thereunto requested. That in pursuance of said understanding and agreement a printed blank form of deed such as had theretofore been and then was in use by said Northern Pacific Railroad Company in receiving conveyances of land to the said Robert R. Thompson as trustee for said company was delivered on behalf of said company and of the said L. M. Starr to one Job Carr, the father of said plaintiff Anthony P. Carr, with the request that he the said Job Carr fill up the said blank with the names of the said Anthony P. Carr and Josephine Carr his wife as grantors and with the description of said premises described in said quitclaim deed, and take the same to said Anthony P. Carr and his said wife, to be by them executed to said Robert R. Thompson as trustee as aforesaid; and at the same time the said quitclaim deed was delivered on behalf of said L. M. Starr to said Job Carr, to be by him delivered to the said Anthony P. Carr upon the execution by himself and wife of such trust deed
455 of said premises to the said Robert R. Thompson as trustee as aforesaid and delivery thereof by the said Anthony P. Carr and his said wife to one George E. Atkinson for and in behalf of the said Robert R. Thompson, trustee, and upon the understanding and agreement with the said Job Carr that in case of the failure of the said Anthony P. Carr and wife to execute and deliver as aforesaid the said trust deed to the said Robert R. Thompson as trustee as aforesaid, the said quitclaim deed should forthwith and on the same day be returned and delivered up to the said L. M. Starr or to the said George E. Atkinson in his behalf.

XXXVIII. That the said Job Carr, disregarding the said request to him in this behalf, filled up the said printed blank form of deed of trust to the said Robert R. Thompson as trustee as aforesaid with the description of the following-described tract of land situated in the said county of Pierce, namely: "The northwest quarter of the southeast quarter of section eight (8) in township twenty (20) north, of range three (3) east of the Willamette meridian, containing forty (40) acres more or less according to the United States survey," instead of filling up said printed blank form of deed with the description of the premises in controversy described in the said quitclaim deed so delivered to the said Job Carr as aforesaid, and the said plaintiff Anthony P. Carr on the said third day of July A. D. 1873 executed and procured to be executed by his said wife the said deed of trust so falsely filled up by the said Job Carr with the description last

hereinabove recited, instead of executing to the said Thompson as trustee as aforesaid a deed of trust of the premises in controversy described in said quitclaim deed, and immediately after the execution of such deed of trust handed the same to the said George E. Atkinson, without the knowledge of the said Atkinson that the same contained the said false description instead of the description of the premises in controversy, in pretended compliance with the said understanding and agreement by and between the said plaintiff
456 and the said L. M. Starr upon which the said quitclaim deed was executed by the said Starr and delivered to the said Job Carr as aforesaid.

XXXIX. That immediately after handing to the said George E. Atkinson as aforesaid the said spurious deed of trust filled up with the said false description as aforesaid the said plaintiff seized and took into his possession the said quitclaim deed from a table in the house of the plaintiff whereon the same was then lying (having been laid thereon by the said Job Carr) in the full view and control of the said George E. Atkinson, and then immediately thereafter snatched from the hand of said Atkinson the said spurious deed of trust to the said Robert R. Thompson, trustee, mutilating the same in the struggle to wrest the possession thereof from said Atkinson, who strove to retain such possession; whereupon the said Atkinson, believing that the said spurious trust deed contained the description of the premises here in controversy according to the aforesaid understanding and agreement between the plaintiff and said L. M. Starr, demanded that the plaintiff return the same to him the said Atkinson or else surrender up to him the said quitclaim deed of the said L. M. Starr to the plaintiff; but the plaintiff refused to do either, and fraudulently retained in his possession both of said deeds.

XL. That the said quitclaim deed was on the fifth day of July A. D. 1873 filed for record by said plaintiff in the office of the said county auditor and is recorded at page 29 of volume 4 of Deeds, records of said county.

XLI. That the said quitclaim deed was not executed by the said L. M. Starr in his character as trustee under the said trust deed of the fourteenth day of November A. D. 1872; yet the same purports to quitclaim to the said plaintiff all of his the said L. M. Starr's right, title and interest in and to the said premises described therein; and that by reason of the recording of said quitclaim deed by plaintiff as aforesaid, and the said false claims and pretenses
457 of the said plaintiff to the ownership of the said premises thereunder, the said quitclaim deed creates a cloud upon the title of this defendant to the said premises and prevents this defendant from enjoying the beneficial use thereof.

Wherefore this defendant prays:

First. That it may be adjudged and declared that by virtue of the said several deeds, acts, matters and things in that behalf alleged and set forth in the premises, this defendant became and was seised and possessed in fee simple of the said tract of land in the said trust deed of the fourteenth day of November A. D. 1872 described, and

that this defendant and those whose estate it hath have ever since continued to be, and that this defendant now is, the owner of said land in fee simple and entitled to the possession thereof.

Second. That it may be adjudged and declared that the said pretended quitclaim deed of July 3rd A. D. 1873 was and is void and of no effect, for the want of the delivery thereof by the said L. M. Starr to the said plaintiff as aforesaid, and for the reason that the said L. M. Starr as trustee as aforesaid had no right, power or authority to execute the same for the purpose of reconveying said premises to said plaintiff under the terms of the said trust deed of November 14th A. D. 1872, and also for the reason that the possession thereof was obtained by force and fraud, and also for the reason that the same was not executed by the said L. M. Starr in his character as trustee under said deed of trust; and that the filing of the said quitclaim deed by said plaintiff for record as aforesaid was and is in fraud of the rights of this defendant as the owner of said premises as aforesaid.

Third. That the said pretented quitclaim deed may be adjudged and decreed to be delivered up by the said plaintiff to be cancelled as creating a cloud upon the title of this defendant to the said premises therein described.

458 Fourth. That the said plaintiff and all persons claiming or to claim the said premises under him subsequently to the said fourteenth day of November A. D. 1872 may by decree of this court be perpetually enjoined and restrained from asserting any right, title or interest in or to the said premises or any part thereof adversely to the said estate of this defendant therein, or from entering upon the said premises or any part thereof.

Fifth. That this defendant may have such other or further relief, or both, in the premises as the nature and circumstances of the case may require and to the court may seem meet, together with the costs of this action.

Supplemental Answer.

And for a further and supplemental answer by leave of court first had and obtained this defendant alleges:

First.

For a first supplemental answer:

XLII. That since the filing of this defendant's amended answer herein on the first day of August A. D. 1882 and on or about the ninth day of October A. D. 1882 the said Andrew Miller mentioned in the first defense contained in the foregoing answer executed and delivered to one Peter O. Scharingson a pretended deed of conveyance purporting to convey to the said Peter O. Scharingson the said two acres of land described in said first defense and described as follows: "Commencing at the northwest corner of the southwest quarter of the northwest quarter of section thirty-two, town. twenty-one north, range three east, Willamette meridian, running thence

south twenty (20) rods, thence east sixteen (16) rods, thence north twenty (20) rods, thence west sixteen (16) rods, to place of
459 beginning, containing two acres:" The same being a portion of the premises in controversy herein.

XLIII. That under and by virtue of said pretended deed the said Peter O. Scharingson claims to have become and to be the owner in fee simple and possessed of said two acres of land, by and through mesne conveyances from the said plaintiff Anthony P. Carr, claiming that said plaintiff had become seised and possessed thereof under and by virtue of the said pretended quitclaim deed of July 3rd A. D. 1873 referred to in the tenth paragraph of plaintiff's said amended complaint herein.

XLIV. That the said pretended deed of said Miller to said Scharingson has been recorded in the office of the auditor of said county of Pierce.

XLV. That the said Peter O. Scharingson at the time of taking said pretended deed from said Andrew Miller to him had full notice and knowledge that this defendant was the owner in fee simple of the said two acres of land therein described.

XLVI. That on the fourteenth day of August A. D. 1883 the said Peter O. Scharingson, without leave of court first had and obtained, filed in the office of the clerk of this court a paper purporting to be a petition of intervention as a party plaintiff in this suit, wherein said Scharingson alleged that ever since about the said ninth day of October A. D. 1882 he had been and then was the owner in fee simple and in the possession of said two acres of land above described, and prayed that his alleged rights in relation thereto might be adjudicated upon the same as if he had been originally a party plaintiff in this suit, and for various particular and for general relief.

XLVII. That by reason of the aforesaid claim of said Scharingson to the ownership of the said two acres of land, the said pretended deed of said Miller to said Scharingson creates a
460 cloud upon the title of this defendant to the said two acres of land therein described; and that a complete determination of the controversy in this action cannot be had without the presence of the said Peter O. Scharingson as a party plaintiff therein.

Wherefore this defendant prays, that the said Peter O. Scharingson may be brought into this action as a party plaintiff therein, and that the said pretended deed so as aforesaid executed by said Andrew Miller to said Peter O. Scharingson may be adjudged and decreed to be void and of no effect and to be delivered up and cancelled as creating a cloud upon the title of this defendant to the said two acres of land as aforesaid, and that the said Peter O. Scharingson and all persons claiming or to claim the said premises under him may by decree of this court be perpetually enjoined and restrained from asserting any right, title or interest in or to the said two acres of land or any part thereof adversely to the said estate of this defendant therein or from entering upon the said premises or any part thereof, and that this defendant may have such other or further

relief, or both, in the premises as the nature and circumstances of the case may require and to the court may seem meet.

Second.

For a second supplemental answer:

XLVIII. That since the filing of this defendant's amended answer herein on the first day of August A. D. 1882, and on or about the seventh day of September A. D. 1883, the said Peter O. Scharingson mentioned in said first supplemental answer executed and delivered to one Peter H. Christensen a pretended deed of conveyance purporting to convey to the said Peter H. Christensen one-quarter of an acre of the said two acres of land described in said first supplemental answer, which said one-quarter of an acre is described in said
461 last-mentioned pretended deed as follows, to wit: "A tract of land commencing at the northwest corner of the southwest quarter of the northwest quarter of section (32) thirty-two in township (21) twenty-one north, range (3) three east, running south (5) five rods, thence east (8) eight rods, thence north (5) five rods, thence west (8) eight rods, to place of beginning, same to contain one-fourth acre, all in Pierce county, Washington Territory."

XLIX. That under and by virtue of said pretended deed the said Peter H. Christensen claims to have become and to be the owner in fee simple and possessed of said one-quarter of an acre of land by and through mesne conveyances from the said plaintiff Anthony P. Carr, claiming that said plaintiff had become seised and possessed thereof under and by virtue of the said pretended quitclaim deed of July 3rd A. D. 1873 referred to in the tenth paragraph of plaintiff's said amended complaint herein.

L. That the said pretended deed of said Scharingson to said Christensen has been recorded in the office of the auditor of said county of Pierce.

LI. That the said Peter H. Christensen at the time of taking said pretended deed from the said Peter O. Scharingson to him had full notice and knowledge that this defendant was the owner in fee simple of the said one-quarter of an acre of land therein described.

LII. That by reason of the aforesaid claim of said Christensen to the ownership of said one-quarter of an acre of land the said pretended deed of said Scharingson to said Christensen creates a cloud upon the title of this defendant to the said one-quarter of an acre of land therein described; and that a complete determination of the controversy in this action cannot be had without the presence of the said Peter H. Christensen as a party plaintiff therein.

462 Wherefore this defendant prays, that the said Peter H. Christensen may be brought into this action as a party plaintiff therein, and that the said pretended deed so as aforesaid executed by the said Peter O. Scharingson to the said Peter H. Christensen may be adjudged and decreed to be void and of no effect and to be delivered up and cancelled as creating a cloud upon the title of this defendant to the said one-quarter of an acre of land as aforesaid, and that the said Peter H. Christensen and all persons claiming or

to claim the said premises under him may by decree of this court be perpetually enjoined and restrained from asserting any right, title or interest in or to the said one-quarter of an acre of land or any part thereof adversely to the said estate of this defendant therein or from entering upon the said premises or any part thereof, and that this defendant may have such other or further relief, or both, in the premises as the nature and circumstances of the case may require and to the court may seem meet.

Third.

For a third supplemental answer:

LIII. That, as this defendant has been informed since the filing of this defendant's amended answer herein on the first day of August A. D. 1882 and verily believes, the said plaintiff heretofore and subsequently to the twenty-eighth day of June A. D. 1875, but at what precise date this defendant is not advised, made and entered into a pretended contract with one Louis Caldwell whereby said plaintiff agreed to convey to said Caldwell a certain one acre of land described as follows: Commencing at a point twenty rods south of the northwest corner of the southwest quarter of the northwest quarter of section number thirty-two (32) in township number twenty-one (21) north, of range three (3) east of the Willamette meridian, and running thence east eight rods, thence south twenty rods,
463 thence west eight rods, thence north twenty rods to the place of beginning: The same being a portion of the premises in controversy herein.

LIV. That under and by virtue of said pretended contract the said Louis Caldwell claims to have become the purchaser and to be entitled to a conveyance in fee simple of the said one acre of land from the said plaintiff Anthony P. Carr, and that he is now the equitable owner thereof, claiming that said plaintiff became seised and possessed thereof under and by virtue of the said pretended quitclaim deed of July 3rd A. D. 1873 referred to in the tenth paragraph of plaintiff's said amended complaint.

LV. That the said Louis Caldwell at the time of making said pretended purchase from said plaintiff had full notice and knowledge that this defendant was the owner in fee simple of the said one acre of land.

LVI. That this defendant is informed and believes that the said pretended contract was in writing and was in the form of a bond of the said plaintiff to the said Louis Caldwell conditioned for the conveyance of said land by the said plaintiff to the said Caldwell on the payment of a certain sum of money therein specified, but to this defendant unknown, by the said Caldwell to the said plaintiff, and that said Caldwell has paid to the said plaintiff a certain portion of such sum of money on account.

LVII. That the said pretended contract or bond and the said claim of the said Caldwell to be the equitable owner of the said one acre of land as aforesaid create a cloud upon the title of this defendant to the said one acre of land; and that a complete determination

of the controversy in this action cannot be had without the presence of the said Louis Caldwell as a party plaintiff therein.

Wherefore this defendant prays, that the said Louis Caldwell may be brought into this action as a party plaintiff therein, and
464 that the said pretended contract so as aforesaid made and entered into by the said plaintiff with the said Caldwell may be adjudged and decreed to be void and of no effect, and if found to be in writing, whether in the form of a bond or otherwise, may be decreed to be delivered up and cancelled as creating a cloud upon the title of this defendant to the said one acre of land as aforesaid, and that the said Louis Caldwell and all persons claiming or to claim the said premises under him may by decree of this court be perpetually enjoined and restrained from asserting any right, title, interest, claim, or equity in or to the said one acre of land or any part thereof adversely to the said estate of this defendant therein, or from entering upon the said premises or any part thereof; and that this defendant may have such other or further relief, or both, in the premises as the nature and circumstances of the case may require and to the court may seem meet.

Fourth.

For a fourth supplemental answer:

LVIII. That since the filing of this defendant's amended answer herein on the first day of August A. D. 1882, and on or about the seventeenth day of January A. D. 1883, the said plaintiff, Anthony P. Carr, executed and delivered to one R. V. Staley a pretended deed of conveyance purporting to convey to the said R. V. Staley a certain one acre of land described as follows, namely: Beginning at a point twenty rods south and eight rods east of the northwest corner of the southwest quarter of the northwest quarter of section number thirty-two (32), in township number twenty-one (21) north, of range three (3) east of the Willamette meridian, running thence south twenty rods, thence east eight rods, thence north twenty rods, thence west eight rods to the place of beginning, the same being a portion of the premises in controversy herein.

465 LIX. That under and by virtue of said pretended deed the said R. V. Staley claims to have become and to be the owner in fee simple and possessed of the said one acre of land, claiming that said plaintiff had become seized and possessed thereof under and by virtue of the said pretended quitclaim deed of July 3rd A. D. 1873 referred to in the tenth paragraph of plaintiff's said amended complaint herein.

LX. That the said pretended deed of said plaintiff to the said R. V. Staley has been recorded in the office of the auditor of said county of Pierce.

LXI. That the said R. V. Staley at the time of taking said pretended deed from said plaintiff had full notice and knowledge that this defendant was the owner in fee simple of the said one acre of land therein described.

LXII. That by reason of the aforesaid claim of the said R. V.

Staley to the ownership of the said one acre of land the said pretended deed of said plaintiff to said Staley creates a cloud upon the title af this defendant to the said one acre of land therein described; and that a complete determination of the controversy in this action cannot be had without the presence of the said R. V. Staley as a party plaintiff therein.

Wherefore this defendant prays, that the said R. V. Staley be brought into this action as a party plaintiff therein, and that the said pretended deed so as aforesaid executed by said plaintiff to said R. V. Staley may be adjudged and decreed to be void and of no effect and to be delivered up and cancelled as creating a cloud upon the title of this defendant to the said one acre of land as aforesaid, and that the said R. V. Staley and all persons claiming or to claim the said premises under the said Staley may by decree of this court be perpetually enjoined and restrained from asserting any right, title or interest in or to the said one acre of land or any part
466 thereof adversely to the said estate of this defendant therein or from entering upon the said premises or any part thereof, and that this defendant may have such other or further relief, or both, in the premises as the nature and circumstances of the case may require and to the court may seem meet.

Fifth.

For a fifth supplemental answer:

LXIII. That since the filing of this defendant's amended answer herein on the first day of August A. D. 1882, and on or about the eighth day of August A. D. 1883, the said R. V. Staley in said fourth supplemental answer mentioned executed and delivered to one J. S. Howell a pretended deed of conveyance purporting to convey to said J. S. Howell a certain one acre of land described in said pretended deed as follows, to wit: "That certain tract of land described as follows: Commencing at a point twenty rods south and eight rods east of the northwest corner of section thirty-two, township twenty-one north, range three east, Willamette meridian, running thence south twenty rods, thence east eight rods, thence north twenty rods, thence west eight rods to place of beginning, containing one acre more or less."

LXIV. That the said J. S. Howell claims that at the time of the execution of the said deed of the said R. V. Staley to him he purchased of the said R. V. Staley the said one acre of land which is described in the said pretended deed of the said plaintiff to the said R. V. Staley mentioned in the said fourth supplemental answer, that is to say: A certain one acre of land described as follows; Commencing at a point twenty rods south and eight rods east of the northwest corner of the southwest quarter of the northwest quarter of section number thirty-two (32) in township number twenty-one (21) north, of range three (3) east of the Willamette meridian,
467 running thence south twenty rods, thence east eight rods, thence north twenty rods, thence west eight rods to place of beginning: The same being a portion of the premises in controversy herein; and that it was the intention of the said R. V. Staley and of

himself the said J. S. Howell that the said last-described premises should be described in the said deed for the said R. V. Staley to him instead of the premises which are described therein as aforesaid. And the said J. S. Howell claims the right to have said deed reformed and to be entitled to a conveyance from the said R. V. Staley of the said one acre of land last above described, in fee simple, and that he is now the equitable owner thereof by and through a conveyance from the said plaintiff to the said R. V. Staley, claiming that said plaintiff had become seised and possessed thereof under and by virtue of the said pretended quitclaim deed of July 3rd A. D. 1873 referred to in the tenth paragraph of plaintiff's said amended complaint herein.

LXV. That the said pretended deed of said R. V. Staley to said J. S. Howell has been recorded in the office of the auditor of said county of Pierce.

LXVI. That the said J. S. Howell at the time of taking said pretended deed and making said pretended purchase from said R. V. Staley had full notice and knowledge that this defendant was the owner in fee simple of the said one acre of land claimed to have been purchased by him as aforesaid.

LXVII. That the aforesaid claim of the said J. S. Howell to be the equitable owner of the said one acre of land last above described and to be entitled to a reformation of the said deed from the said R. V. Staley as aforesaid so that the said last-described one acre of land shall be described in said deed as aforesaid creates a cloud upon the title of this defendant to the said one acre of land; and that a complete determination of the controversy in this action cannot be had without the presence of the said J. S. Howell as a party plaintiff herein.

468 Wherefore this defendant prays, that the said J. S. Howell may be brought into this action as a party plaintiff therein and that the said pretended deed so as aforesaid executed by the said R. V. Staley to the said J. S. Howell may be adjudged and decreed to be void and of no effect as a conveyance to the said Howell of any right, title or interest in or to said one acre of land in controversy, and that the said J. S. Howell has no right to a conveyance of said one acre of land by way of reformation of said deed or otherwise as claimed by him as aforesaid, and that the said J. S. Howell and all persons claiming or to claim the said premises under him may by decree of this court be perpetually enjoined and restrained from asserting such claim as a cloud upon the title of this defendant, or from asserting any right, title, interest, claim or equity in or to said one acre of land or any part thereof adversely to the said estate of this defendant therein or from entering upon the said premises or any part thereof, and that this defendant may have such other or further relief, or both, in the premises as the nature and circumstances of the case may require and to the court may seem meet.

McNAUGHT, FERRY, McNAUGHT AND MITCHELL,
GEORGE FULLER,
JOHN ARTHUR,
Attorneys for the Defendant The Tacoma Land Company.

TERRITORY OF WASHINGTON, } ss:
County of Pierce, }

Isaac W. Anderson, being first duly sworn, on oath doth depose and say, that he is the general agent at New Tacoma in said county of the above-named defendant The Tacoma Land Company, and is the managing agent of said company in said county and an
469 agent thereof upon whom service of a summons or notice might be made, that he has heard read the foregoing answer and knows the contents thereof and believes the same to be true.

ISAAC W. ANDERSON.

Sworn to and subscribed before me this eighth day of November A. D. 1883.

JOHN ARTHUR,
Notary Public.

Filed Nov. 8, 1883.

JAMES SEAVEY, *Clerk,*
By J. H. WILT, *Deputy Clerk.*

SIRS: You will please take notice that the defendant The Tacoma Land Company has, by leave of court first had and obtained, filed this day an amended answer in the above-entitled action.

Dated at New Tacoma, W. T., this eighth day of November, A. D. 1883.

JOHN ARTHUR,
One of the Attorneys for the Defendant
The Tacoma Land Company.

To Messrs. Anthony P. Carr, plaintiff, and Campbell, Senter, Campbell and Bashford, plaintiff's attorneys.

Service of a copy of the within notice is acknowledged this eighth day of November A. D. 1883.

CHAS. N. SENTER,
Att'y for Pl't'ff.

470 In the District Court of the Third Judicial District of the Territory of Washington, Holding Terms at New Tacoma in and for the County of Pierce. In Equity.

ANTHONY P. CARR, Plaintiff,
vs.
THE TACOMA LAND COMPANY and LAKE SUPERIOR AND PUGET SOUND COMPANY, Defendants. } No. 329. Motion.

Comes now the above-named defendant The Tacoma Land Company by John Arthur, one of its attorneys, and upon the affidavits of the said John Arthur filed in the above-entitled action on the tenth day of September A. D. 1883 and on the third day of October A. D. 1883 respectively, and upon the supplemental answer filed herein, and upon all the pleadings and proceedings in the cause,

moves the court, in order that there may be a complete determination of the controversy in this action, that Peter O. Sharingson, Peter H. Christensen, Louis Caldwell, R. V. Staley, J. S. Howell, and each of them, may be brought into this action as parties plaintiff therein.

Dated at New Tacoma, W. T., this eighth day of November A. D. 1883.

JOHN ARTHUR,
One of the Attorneys for the Defendant The Tacoma Land Company.

Filed Nov. 8th, 1883.

JAMES SEAVEY, *Clerk*,
By J. H. WILT, *Deputy*.

471 Service of a copy of the within motion is acknowledged this eighth day of November A. D. 1883.

CHAS. N. SENTER,
Attorney for Pl't'ff.

In the District Court of the Third Judicial District of the Territory of Washington, Holding Terms at New Tacoma in and for the County of Pierce. In Equity.

ANTHONY P. CARR, Plaintiff,
vs.
THE TACOMA LAND COMPANY and LAKE SUPERIOR AND PUGET SOUND COMPANY, Defendants. } No. 329.

This cause came on regularly for hearing at chambers in Seattle on the fourteenth day of February A. D. 1884, on the motion of plaintiff to strike portions of defendant's amended answer herein filed on the eighth day of November A. D. 1883, which motion was filed herein on the 18th day of December A. D. 1883; and after argument by counsel of the respective parties, and upon full consideration in the premises, the said motion is denied, to which said ruling and the whole thereof counsel for plaintiff excepts, and pl't'ff's exception is allowed.

GREENE, *J.*

Filed Feb'y 15, 1884.

JAMES SEAVEY, *Clerk*,
By J. H. WILT, *Deputy Clerk.*

472 In the District Court of the Third Judicial District of the Territory of Washington, Holding Terms at New Tacoma in and for the County of Pierce. In Equity.

ANTHONY P. CARR, Plaintiff,
vs.
THE TACOMA LAND COMPANY and LAKE SUPERIOR AND PUGET SOUND COMPANY, Defendants. } No. 329.

This cause came regularly on for hearing at chambers in Seattle on the fourteenth day of February A. D. 1884, on motion of the de-

fendant The Tacoma Land Company, by its attorney John Arthur, filed herein on the eighth day of November A. D. 1883; and upon argument by the said attorney and by Charles N. Senter for the plaintiff, and after full consideration in the premises, the motion is granted, and the clerk of said court is directed to issue summons to each and all of the parties named in said motion to appear respectively in the above-entitled action as parties plaintiff therein.

GREENE, *J.*

Filed Feb'y 15th, 1884.

JAMES SEAVEY, *Clerk*,
By J. H. WILT, *Deputy.*

473 *Deposition of Anthony P. Carr.*

In the District Court of the Third Judicial District of the Territory of Washington, Holding Terms at New Tacoma, for Pierce County. In Equity.

ANTHONY P. CARR, Plaintiff,
vs.
THE TACOMA LAND COMPANY and LAKE SUPERIOR AND PUGET SOUND COMPANY, Defendants. } No. 329.

To the Honorable Roger S. Greene, judge of said court:

In pursuance of an order of reference made and entered in the above-entitled cause, on the 21st day of May, 1883, by which it was referred to the undersigned to take the testimony in this cause and report the same to this court; I, Elwood Evans, referee, do respectfully report that I have been attended by the attorneys for the respective parties, viz:—Alexander Campbell, Charles N. Senter and F. W. Bashford, Esquires, of counsel for plaintiff; and John Arthur and George Fuller, Esquires, of counsel for the defendant The Tacoma Land Company, and have examined all the witnesses which have been produced before me, and they gave the following testimony:

ANTHONY P. CARR, a witness for plaintiff, being sworn, testified as follows:

1 Ques. What is your name, age, place of residence and occupation?

Ans. My name is Anthony P. Carr, age 42 years this month.

474 I reside at Clover Creek, Pierce county, about ten miles from this place. I am a photographer by trade.

2 —. Are you plaintiff in this case?

Ans. I am.

3 Ques. Do you know the tract of land in controversy herein?

Ans. I do.

4 Ques. Describe it.

Ans. The S. W. ¼ of N. W. ¼ section 32, T. 21 N. 3 east, consisting of 40 acres.

5 Ques. Who is in possession of that land at present?

Ans. I am.

6 Ques. How long have you been in possession of it continuously?

Ans. Since 1868; I forget the exact date.

7 Ques. How have you had possession of it—what acts have you done there?

Ans. I took the claim under the United States pre-emption law; built a house on it; lived in the house; cultivated the land; made final proof, and received a patent. I cleared and fenced, but not on this 40. I have cut timber, made shingles and hauled saw-logs on this forty. I have also cut, sold and hauled cord-wood off of it, until very recently—in fact within a few weeks of this time; built a slaughter-house and used and rented the same to this day.

8 Ques. Has your possession of the premises ever been disputed by any person up to present time?

Ans. In a weak, nominal kind of way only.

9 Ques. Who has paid the taxes on that land since you have been in possession of it?

Ans. I have.

475 10 Ques. Take this paper and see whether you identify what it is a copy of. (Marked Exhibit A.)

Ans. Yes, sir.

11 Ques. Have you the original of the paper of which Exhibit A is a copy?

Ans. I have not the original.

Plaintiff offers in evidence said Exhibit A, viz: Deed of trust to L. M. Starr wherein A. P. Carr and wife are grantors and L. M. Starr, grantee and trustee. Executed Nov. 14, 1872. Objected to on the ground that no foundation has been laid for the introduction of copy because of inability to produce original, and because of incompetency.

(Paper marked Exhibit A admitted subject to said objection.)

Plaintiff offers in evidence certified copy of deed from A. P. Carr and wife *fo* L. M. Starr. (Exhibit B.)

Defendant objects for reasons as stated to admission of Exhibit A.

(Paper marked Exhibit B admitted subject to said objections.)

12 Ques. Take this paper (handing to witness paper marked Exhibit C) and say if you recognize it.

Ans. I do. It is quitclaim deed of L. M. Starr to myself dated July 3, 1873.

(Paper admitted in evidence marked Exhibit C.)

Defendant objects to admission, because immaterial.

13 Ques. Take this paper (handing to witness a paper marked Exhibit D) and see if you recognize of what it is a copy.

Ans. I recognize it, but have the original and will produce it.

Plaintiff's attorney withdrew this exhibit. The original when produced will be Exhibit D.

Plaintiff offers certified copy of deed, L. M. Starr, trustee, to

Robert R. Thompson, trustee. Executed July 14, 1873. Exhibit E, offered as cloud upon plaintiff's title.

476 Paper admitted marked Exhibit E.

Plaintiff offers in evidence certified copy of deed, R. R. Thompson, trustee, to Tacoma Land Company, executed February 14, 1874. (Exhibit F.)

Defendant's attorneys object same as to previous papers.

Paper admitted and marked Exhibit F.

Plaintiff offers in evidence certified copy of deed, L. M. Starr and wife to Tacoma Land Company, dated February 22, 1875. (Exhibit G.)

Defendant's attorneys object same as before.

Paper admitted and marked Exhibit G.

Plaintiff offers in evidence certified copy of deed from Tacoma Land Company to Lake Superior and Puget Sound Company, dated February 20, 1874. (Exhibit H.)

Defendant's attorneys object same as before.

Paper admitted and marked Exhibit H.

Plaintiff offers in evidence certified copy minutes of proceedings of board of directors of the Northern Pacific Railroad Company, meeting held on the 10th day of September, 1873, certified to by H. M. Teller, Secretary of the Interior. (Exhibit I.)

Defendant's attorneys object same as before, and further that it is incompetent, and if evidence at all not the best evidence.

Paper admitted and marked Exhibit I.

Defendant admits execution of deed by Lake Superior and Puget Sound Company, transferring interest of said company to Tacoma Land Company in the tract in controversy.

Plaintiff's attorney here gave notice that John C. Ainsworth whose deposition has been taken on the part of defendant was now sojourning in Pierce county, within reach of process of this court, and that they would move to strike from the files his said deposition, because the reason upon which said deposition had been taken had ceased to exist.

14 Ques. Did the Northern Pacific Railroad Company, or
477 any one in its behalf, by or through any of its agents or servants, on or before the 1st day of July, 1873, notify you in writing of its acceptance of the proposals mentioned in the trust deed from you and your wife to L. M. Starr?

Ans. No, sir; they never did—no one, directly or indirectly.

15 Ques. Has such a notice ever been served upon you, either before or since that date?

Ans. No, sir.

Cross-examined:

C. E., 1 Ques. Mr. Carr, you say you are in possession of the tract in controversy here, and that you have built a slaughter-house on it. When was that slaughter-house built?

Ans. I said I built and caused it to be built; I helped to build it. That is what I said. I cannot call to mind exactly the summer it

was built. It was near as I can recollect in 1873. I cannot now tell until I have referred to some papers, whether it was 1873 or 1874.

C. E., 2 Ques. You say that your claim to the right of possession of this tract has been disputed only in a weak, nominal kind of way. What do you mean by its being disputed only in a weak, nominal kind of way?

Ans. Certain parties trying to obtain surreptitious possession of my land put in circulation stories to injure my title.

C. E., 3 Ques. Who were those parties?

Ans. Notably the Tacoma Land Company and their tools.

C. E., 4 Ques. Specify the persons that you refer to as the Tacoma Land Company and their tools.

Ans. I cannot answer that. No one can answer it. It is a question that cannot be answered.

C. E., 5 Ques. Why, then, did you say that those parties whom you refuse to specify, and of whom you say nobody can testify as
478 to their existence or acts concerning this tract or claim, tried to get surreptitious possession of the land in controversy?

Ans. I did not refuse to name them. I named the Tacoma Land Company as one. I can name Frank Clark, and I can give you forty names. I did not understand the question, it was in such ambiguous terms. I do not object to answer any question.

C. E., 6 Ques. Why! did you not state in your evidence before the referee that certain parties whom you referred to as the Tacoma Land Company and their tools tried to obtain surreptitious possession of the land in controversy?

Ans. Because they had no legal title.

C. E., 7 Ques. Why, if you know that the Tacoma Land Company and their tools, as you call them, tried to get or obtain surreptitious possession of the land in controversy, do you say that nobody can tell or testify as to who those parties are?

Ans. I told you I could tell. I named some and offered to name more.

C. E., 8 Ques. Why did you say, then, that nobody could tell who they were, if, as you say now, you can tell?

(Plaintiff's attorney objects, because this is a repetition of a question asked, and witness has explained already that he did not understand the question.)

Ans. I did not say that nobody could not tell.

C. E., 9 Ques. State now who those parties are, whom you have referred to as the Tacoma Land Company and their tools.

(Plaintiff's attorney objects—immaterial, irrelevant and not in cross-examination of anything brought out in chief.)

Ans. I have answered that sufficiently for the present.

C. E., 10 Ques. Is the late Frank Clark, deceased, the only person whom you mean and refer to as the Tacoma Land Company and their tools?

479 (Plaintiff's attorneys objected for same reasons as to preceding questions.)

Ans. I did not refer to Clark as the Tacoma Land Company.

C. E., 11 Ques. What did you refer to him as?

Ans. As one of the tools.

C. E., 12 Ques. State now what persons you refer to in connection with and additional to the late Frank Clark as constituting the Tacoma Land Company and their tools, with regard to the tract of land in controversy, and the efforts you allege were made by those parties to get surreptitious possession of said land.

(Plaintiff's attorney objected as above, to this question, and thereupon advised witness not to repeat such offensive word as tools, and suggested that the referee check hereafter the witness or the counsel in the use of any such terms as "tools" or like offensive language.)

Witness then said—I used the word "tools" inadvertently—as I would say "fire shovel" when I meant "chair" and I desire to disclaim any offensiveness to court or parties by what I said—In answer to the question I have already said "I have answered that sufficiently for the present."

C. E., 14 Ques. Then, you refuse to answer the question?

Ans. Yes, for the present.

C. E., 15 Ques. How soon will it be convenient for you, or is it your intention to answer the question fully?

Ans. That I cannot say now.

C. E., 16 Ques. Is a man who is now dead and buried and who never had in his lifetime any interest in the land in controversy, the only person you can name, as constituting the Tacoma Land Company and their tools, whom you charge with trying to get or obtain surreptitious possession of the tract of land now in controversy?

480 (Plaintiff's attorney objects to question because it assumes a fact to exist, to wit, an interest in the land, which has not appeared by the evidence.)

Ans. The only one I choose to name at present.

C. E., 17 Ques. If you know other persons than the late Frank Clark who constituted, in relation to this land and the controversy over it, The Tacoma Land Company and their tools, who tried as you say to get surreptitious possession of the land in question, why do you refuse to name such persons?

Ans. He is the only one I think of just now, whom I would name positive.

C. E., 18 Ques. You said a few minutes since, that you could name forty, if necessary, of the persons engaged in this supposed conspiracy against you, in relation to this land: if that was true, how is it that Frank Clark, now dead, is the only person you can at this moment recollect out of that forty?

Ans. Perhaps I could recollect more if I had time sufficient to study and think them up.

C. E., 19 Ques. You have, then, no explanation to give of this sudden and extraordinary loss of memory by which, out of forty names present to your mind a few minutes since, you can at this moment recall just one, and that the name of a man who is dead and buried?

Ans. Yes, I have an explanation.

C. E., 20 —. State what such explanation is.

Ans. First—I did not say I could name forty just then—and distorting my language has confused my ideas about other matters—you did not repeat what I said—led me from the subject for a time.

C. E., 21 Ques. How came you, if you were confused, as you claim, to recollect solely the name of a dead man, and forget the other thirty-nine names of men presumably living?

481 (Plaintiff's attorney objects, for same reasons as to previous cross-interrogatories.)

Ans. I could not forget Mr. Clark; he was prosecuting attorney in the case and took a prominent part in the case.

C. E., 22 Ques. The reason, then, that you recollect his name out of the forty you could recall a few minutes since, is that he was prosecuting attorney in the case: now state when he became prosecuting attorney (if he ever became such) in the case, and whether he was one of those tools who tried, as you say, in the year 1873, to get surreptitious possession of the land in controversy.

(Plaintiff's attorney objected as above—Further objection—it interpolates language, not used by witness.)

Ans. I meant attorney in the case for the defense—it was a mere *lapsis lingui* if I said prosecuting attorney—To the latter part of the question, "In my opinion he was."

C. E., 23 Ques. Then, you are not sure that even this dead man, whose name alone you can at this moment recall out of the forty present to your mind a few minutes since, was one of the supposed or imaginary tools who assisted in getting or trying to get surreptitious possession of this tract of land?

Ans. I did not say that I could remember forty then.

C. E., 24 Ques. Can you not answer the question just put to you as to your not being sure that even Frank Clark was one of the tools referred to?

Ans. I can—In my mind he was—In my opinion he was.

C. E., 25 Ques. Then, you cannot name a single person as to whom you are positive that he was engaged in any attempt or conspiracy to get or obtain surreptitious possession of this land?

Ans. Not just now.

C. E., 26 Ques. What were the acts which you charge against those forgotten parties as amounting to an attempt or conspiracy to obtain such surreptitious possession?

482 Ans. Industriously circulating reports calculated to injure my title.

C. E., 27 Ques. If you cannot name a single person, dead or alive,

who you are positive was engaged in such attempt or conspiracy as you have charged, how do you know that such reports were circulated?

Ans. From a matter of common talk or report—everybody knows it—you cannot go out of doors, and among those who were here at the time and not hear it—it was a subject of common conversation.

C. E., 28 Ques. Is it not singular that, if you believe you had any right or title to this land, you cannot name a solitary human being who was to your knowledge engaged either in the attempt or conspiracy to get surreptitious possession of the land or in the circulation of reports calculated to injure what you consider your title?

Ans. I do not think I used the word conspiracy in my evidence—I do not call to mind any person who made it their sole business.

C. E., 29 Ques. You cannot say, then, whether or not such forgetfulness of all the parties whom you have charged as being engaged in these injurious proceedings against you is singular?

Ans. Under the circumstances I do not think it is singular.

C. E., 30 Ques. What was the purport of those reports which you charge as having been circulated by those forgotten parties, and as having been calculated to injure the title which you say you claimed in that land?

Ans. It would take a very voluminous answer to give the purport of those reports—I can do it.

C. E., 31 Ques. Do it, then.

Ans. One person would say, "So you settled with the railroad company and give them the land," which I would deny, as I never did. Several men told me they would buy part of the land of me, but the land company claimed it. "What title have they?"

483 "None," I would say. "Did not you bond it to the railroad company?" I answered yes but the bond expired—and Starr the trustee deeded it back to me. The usual answer was, "Well, the company say they are going to hold it anyhow"—and thus several sales for me were spoiled—I can name, if you wish me to, several persons who talked this way to me.

C. E., 32 Ques. If you can recollect ten years back the names of several persons who talked to you about buying the land in question, how can you account for your total inability to recall, out of the forty names of persons who you say were engaged in injuring you, only a single name, and that the name of a dead man, of whose part in the attempt or conspiracy against your title and possession you are not positive, or whether he was engaged in it at all?

(Plaintiff's attorney objects—because it is immaterial and irrelevant.

And said attorney moves to strike out all questions and answers in this cross-examination preceding this not objected to, upon the same grounds.)

Ans. His memory ain't as good as mine; I answered that question some time ago—because Clark was attorney in the case, and I naturally remember him.

C. E., 33 Ques. Then, there was nothing in all this attempt or

conspiracy which you suppose to have existed in 1873, and since, against the title and possession claimed by you which fixed itself in your mind, except the circumstance that the late Frank Clark became, in the year 1882, the attorney for the Tacoma Land Company in defending this action instituted by you?

(Plaintiff's attorney renews the same objections as above.)

Ans. I did not say so.

C. E., 34 Ques. You did not say what?

484 Ans. What you assert that I said.

C. E., 35 Ques. That attorneyship of Frank Clark is, then, the only circumstance which so interested you as to enable you to recall just now his name alone out of the forty which you could recall an hour or two ago?

Ans. I did not say so.

C. E., 36 Ques. What reason have you for declining to answer the questions put to you?

Ans. I do not decline to answer questions.

C. E., 37 Ques. If you do not decline to answer questions, why do you refuse or fail to answer the last preceding question in a direct negative or affirmative manner?

Ans. I answered it directly.

C. E., 38 Ques. Can you specify any act of the late Frank Clark in the year 1873, when this supposed attempt or conspiracy against the possession and title claimed by you in this land was on foot or in existence, which was calculated to injure such title and possession, and justify you in stigmatizing him as having then been one of the tools of the Tacoma Land Company?

(Plaintiff's attorney objects, because immaterial and irrelevant—and because not cross-examination as to matters drawn out in chief.)

Ans. I can.

C. E., 39 Ques. State such act or acts.

Ans. Shortly after Starr's deed back to me, Clark came to me and told me that the company intended to hold that land, but if I would give him half of it he would take the case for me and beat the company. I told him that I did not see that the company had any claim on it—He said they had lots of money, and could make me lots of trouble—for you know money makes the mare go—that made me suspicious of him—and I did not employ him.

C. E., 40 Ques. Then, the late Frank Clark's proposition to

485 you to buy from you, as you say, a half interest in the land in controversy is the only act of hostility towards you or your possession or title in that land upon which you base the charge that he was one of the tools of the Tacoma Land Company, and that he was engaged with others in trying to get surreptitious possession of that land?

(Plaintiff's attorney made same objection as above.)

Ans. Clark did not offer to buy half the land of me, he wanted me to give it to him.

C. E., 41 Ques. That is the only answer you can give to the question?

Ans. No, sir.

C. E., 42 Ques. What do you mean by no, sir?

Ans. I can give another answer.

C. E., 43 Ques. Why did you not give the answer when the question was read to you by the referee, if you have another answer to give?

Ans. You gave two questions at once is the reason.

C. E., 44 Ques. To repeat the question, I will ask you whether that proposition on the part of the late Frank Clark, to buy or acquire from you half your interest or right in the tract of land in question was the only act of hostility towards you, or the title or possession in the land claimed by you, in the year 1873, upon which you base the charge that he was one of the tools of the Tacoma Land Company, and was then engaged with a great many others, whom you have forgotten, in an attempt or conspiracy to get surreptitious possession of that land?

(Plaintiff's attorney objected for same reasons as made to previous questions.)

Ans. Not the only one.

C. E., 45 Ques. Did you consider that proposition then as an act of hostility towards you, and as part and parcel of the attempt
486 or conspiracy against you, or your title or claim of title, which you say then existed?

(Plaintiff makes same objection.)

Ans. I did—the way it came—I did think it an act of hostility.

C. E., 46 Ques. What do you mean by the words "the way it came"?

(Plaintiff's attorney objected as before.)

Ans. By his offering to beat the case for or against me.

C. E., 47 Ques. You did not say that he offered or threatened to beat the case, if by that you mean to win the case, against you. Why do you now couple "against" with "for" in your explanation?

(Plaintiff objects as before.)

Ans. He offered to beat the case for me, and me give him half the land, for his services. I supposed if I refused this, he would take the case against me and beat me out of all of it.

C. E., 48 Ques. Why, in your answer specifying the aforesaid proposition of the late Frank Clark as being the basis of your charge against him that he was one of the tools of the Tacoma Land Company and was engaged with others in the aforesaid attempt or conspiracy against you and your title, did you not detail

this threat towards you, which you now give as the act of hostility on his part to you?

(Plaintiff's attorney makes same objection.)

Ans. I'll be sworn I do not understand the question—I do not know what you mean—there's no sense to it to me.

C. E., 49 Ques. You said, in answer to the demand for a specific act of hostility to you on the part of the late Frank Clark, that he proposed to you to buy or acquire from you half of your interest or right in the land in controversy, and would in return "beat the case" for you which the Tacoma Land Company would bring to hold possession of the land; you did not say that he threat-
487 ened to beat the case against you, if you refused to sell to him, or enter into the bargain proposed by him; how is it that you did not recall it in giving your former answer?

(Plaintiff's attorney objects as before.)

Ans. Because you interrupted me; if you had let me go on, I would or might have told you then.

C. E., 50 Ques. How is it that in that answer you were able to recall, in answer to the demand for the specification of an act of hostility, the friendly proposition referred to, but did not think of nor recall the threat which you have since detailed?

(Plaintiff's attorney objects as before.)

Ans. Probably of something being said in conversation here, diverting my mind.

NOTE.—Witness at this point, 5.30 p. m., complained of headache. At request of his counsel, reference adjourned until 10 a. m., June 14, 1883.

C. E., 51 Ques. Mr. Carr, as a preliminary to the resumption this morning of the cross-examination interrupted and adjourned yesterday by your complaint of illness, I will ask the referee to read to you your answer to the question C. E. 5, folio 5, asking for a specication of the parties characterized by you as the Tacoma Land Company and their tools.

Referee reads as follows (see folio 6) answer to cross-ex., Ques. 5, folio 6: "I did not refuse to name them. I named the Tacoma Land Company as one. I can name Frank Clark, and I can give you forty names."

Question: You see from referee's report of your testimony yesterday, that your frequent denials of your having declared your ability to name forty persons as constituting the "tools" of the Tacoma Land Company were not true, do you not?

(Plaintiff's attorney objects to the question on the ground that it assumes certain things were not true—and further

The question is unintelligible—it does not explain what is
488 not true.

Further, that it is not cross-examination on direct evidence, but upon matter brought out on cross-examination.)

Ans. I do not understand the question; I do not know what I am expected to answer; I cannot get the thing into my head, to give an answer.

C. E., 52 Ques. Mr. Carr, you are regarded in this community as a keen-minded, bright, educated man, are you not?

(Plaintiff's attorney objected—immaterial, irrelevant and not responsive to anything brought out in chief; furthermore it is hearsay.)

Ans. I am not an educated man by any means.

C. E., 53 Ques. I will ask you again in what estimation as to brightness of mind, you are held in this community?

(Plaintiff's attorney made same objection as made to previous question; witness is not liable to know, in what estimation he is held.)

Ans. I cannot judge for the community; they judge for themselves.

C. E., 54 Ques. I will ask you, then, whether or not you have always considered yourself, and still do, as a bright-minded man, or as a particularly stupid one?

(Plaintiff's attorney made same objection as to previous question. Further, witness's testimony as to his own intelligence inadmissible.)

Ans. I claim no mental superiority, neither am I an idiot.

C. E., 55 Ques. In your testimony yesterday, Mr. Carr, you used words of learned length and employed Latin to express your meaning; do you consider that display of learning consistent with the utter stupidity which you now affect?

(Plaintiff's attorney objects same as above and in addition thereto
it assumes he affects a stupidity now and also assumes that
489 he used learned language and Latin phrases, which is not established by the evidence.)

Ans. I do not assume stupidity to-day.

C. E., 56 Ques. I will ask you, then, if you do not assume stupidity as you say you do not, why do you show such a manifest reluctance to answer the plainest questions, on the plea that you do not understand them?

(Plaintiff's attorney made same objections as above.)

Ans. I have no hesitation in answering plain questions, nor have I any reluctance; I do not wish to avoid answering questions that I understand.

C. E., 57 Ques. I will ask you, Mr. Carr, and I specially urge that you be candid, just for once, in your answer, even though you in-

tend never to be so again, whether it is not your consciousness that you have entangled yourself in a network of falsehood, rather than the want of quick intelletual perception, which makes you so very evasive and unwilling a witness?

(Plaintiff's attorney objects as above.)

Ans. Yes and no. I do not wish to be called unwilling. I will answer any question I understand.

C. E., 58 Ques. You stated yesterday that several persons talked to you in 1873 about buying from you the tract of land in controversy, and that they were deterred from doing so by the title acquired in it under the trust deed which you and your wife made to Lewis M. Starr, as trustee for the Northern Pacific Railroad Company, and you stated also that your possession was never disputed except in a "weak, nominal kind of way:" how can you reconcile these two statements?

Ans. The statements are perfectly plain: no one would want to buy land with any shadow on the title.

C. E., 59 Ques. You stated, Mr. Carr, that those persons, and also the late Frank Clark, assured you that the railroad company
490 intended to hold the land; did you consider that intention on the part of the railroad company or of the land company, its successor in interest, only a "weak, nominal kind of way" of disputing your possession?

Ans. Not being legal, it must have been only nominal.

C. E., 60 Ques. You were not able, Mr. Carr, to persuade anybody who talked to you about buying the land in question, that the title you claimed was a valid one, or that the railroad company's claim was merely weak and nominal?

(Plaintiff's attorney objected as above, for reasons above stated.)

Ans. They would say "Oh! your title is good, but a poor man cannot law against capital," "Stands no show, against capital," or something like that.

C. E., 61 Ques. Then, Mr. Carr, nobody believed among those parties that the title which you claimed could be established, and therefore nobody would buy from you?

(Plaintiff's attorney objected as above.)

Ans. Yes—they said it could be established, but it took more than they had to do it—not many capitalists in this country.

C. E., 62 Ques. Why, Mr. Carr, would it take a great deal of money in this jurisdiction to establish an honest title in court?

(Plaintiff objects as above.)

Ans. It takes a great deal of money in any jurisdiction to law—I don't know that it takes more here than in other places.

C. E., 63 Ques. You have, Mr. Carr, intimated throughout your testimony that it is specially hard in this jurisdiction to establish an honest claim against parties possessing wealth; what is your ground for such conviction?

(Plaintiff's attorney objected as above and made further objection that it assumes that the witness has intimated certain things as alleged in question, which is not substantiated by the evidence by him given.)

491 Ans. I made no such intimation.

C. E., 64 Ques. Can you name, Mr. Carr, any of the parties whom you have frequently referred to as making such charges or reflections on the course of justice in this jurisdiction?

(Plaintiff's attorney objected on the same grounds as preceding question.)

Ans. I made no charge against the course of justice.

C. E., 65 Ques. I ask you, Mr. Carr, whether you can name those parties; I want a direct answer to my question?

A. I don't know what parties you are referring to.

C. E., 66 Ques. I refer, Mr. Carr, to the parties who you say were ready to buy the tract of land in question from you, but who habitually declared, as you state, that a poor man had no show in law against capital. Now, who were those parties?

(Plaintiff objected—because immaterial and irrelevant—not cross-examination.)

Ans. H. M. Steele—. R. Kallow—George E. Atkinson said he would buy only for that. M. Lind, a Norwegian, said he would buy but for that. I went so far as to make the deed to him, and he backed out; I made out another deed to another man named Wilson; he had the money to pay me, and somebody told him that the land company would contest the title with me. Smart says he would buy—I do not know his first name—only for that.

C. E., 67 Ques. Is it not a fact, Mr. Carr, that nobody believed you had any title to the land, after you had deeded it to the trustee for the Northern Pacific Railroad Company, and the railroad company had carried out the conditions of the deed, by locating and building its main line of railroad from the Columbia river to Commencement bay, and operating the same then and since?

(Plaintiff's attorney objected—it is immaterial and irrelevant, what people believe—not cross-examination. Furthermore it assumes that the railroad company complied with conditions of the trust deed, which is the point here in dispute.)

492 Ans. No part of it is a fact.

C. E., 68 Ques. How, Mr. Carr, after your failure to convince anybody that you had a title under which it would be safe to purchase from you the tract of land in question, can you say, with any appearance of truth, that your possession in that tract was never disputed by any party, except in a weak, nominal kind of way?

(Plaintiff's attorney objected as immaterial and irrelevant—further it assumes an entire failure, of which there has been no evidence.)

A. Because, as I said before, no poor man wants to law against a rich company—cannot carry it so far.

C. E., 69 Ques. Is that your way of reconciling the contradictions which exist between those two statements in your testimony?

(Objected to because it fails to specify the two statements referred to—and not cross-examination.)

Ans. I made no contradictions.

C. E., 70 Ques. You consider, then, that a title clouded by a claim recognized by the community in general as valid and honest, was disputed only in a weak, nominal kind of way?

Ans. I deny that the community in general recognized the claim against my title as honest.

C. E., 71 Ques. How was it, then, that you could convince nobody in that community that yours was a safe title under which to purchase the tract in question?

(Objected to as immaterial and irrelevant and no foundation laid for such question.)

Ans. No one doubted my title, buf did not wish the chances of contest.

C. E., 72 Ques. What do you mean by the chances of contest? Is it not that the chances in a legal contest would probably be against you, and the title which you claim?

493 Ans. No sir—I do not consider the legal chances against me—my lack of money was my only weak point.

C. E., 73 Ques. What do you mean, then, by the chances of contest?

Ans. I had failed for lack of money and nothing else.

C. E., 74 Ques. Lack of money for what?

Ans. To carry on a lawsuit—in case the company saw fit to carry one on they would outwind me with money, which they had plenty of.

C. E., 75 Ques. Why do you think the company would outwind you, if you had any belief in the honesty or validity of the title you claim?

Ans. Honest men are beat every day with money.

C. E., 76 Ques. In this jurisdiction, in a suit at law or equity?

(Objected to by plaintiff's attorney, as immaterial and irrelevant; furthermore the question is deceptive—an attempt to draw from witness expressions derogatory to this court and its jurisdiction.)

Ans. Not in this jurisdiction—I make no charges—I refer to the country over.

E. E., 77 Ques. Now, Mr. Carr, what concern has the course of justice in any other jurisdiction than this one with your chances of contest over a title to land lying in Pierce county?

(Plaintiff's objection as before.)

Ans. I do not know that it has any concern. I refer to the fact of men being beaten by money.

C. E., 78 Ques. Now, Mr. Carr, when you spoke of the chances of contest over the title to this land, and how honest men are beaten every day with money in such contests, what jurisdiction had you in view?

Ans. I referred to men being beaten generally by money, not in land contests alone. Money wins in all contests of life.

494 Counsel for defendant referred to cross-question 51, folio 16, and amended said question to read as follows, and make the same the more explicit: Question. You see from referee's report of your testimony yesterday that your frequent denials of your having declared your ability to name forty persons as constituting in part or in whole the tools of the Tacoma Land Company were not true, do you not?

(Plaintiff's attorney renewed objections to cross-question 51—against this question.)

Ans. That sounds ambiguous—I give it up.

C. E., 80 Ques. You consider yourself a poor man in the sense in which you have been using that phrase, do you not?

(Plaintiff's attorney made same objections as before—immaterial and irrelevant.)

Ans. As regards to money—financially I am a poor man.

C. E., 81 Ques. How is it then, being so poor, that you are able to secure in this cause the services of the five lawyers who represent you here, and represented you yesterday?

(Objected to, as immaterial and irrelevant.)

Counsel for plaintiff directed witness not to answer the question.

Ans. When justice puts me in possession of my land, I expect to pay them out of the proceeds of it.

C. E., 82 Ques. You state that H. M. Steele, W. R. Karlow, George E. Atkinson, M. Lind, a Norwegian, and —— Wilson and a Mr. Smart were the parties who would have bought your land but for their belief, as you say, that poor men stand no show of justice in such a contest as was expected over the title claimed by you; will you state whether the H. M. Steele referred to is a resident of Tacoma or New Tacoma now?

Ans. He is not now.

C. E., 83 Ques. How long since he ceased to be a resident of either Tacoma or New Tacoma?

495 Ans. I do not remember—he has been gone three or four years—I don't know how long since he left.

C. E., 84 Ques. Is W. R. Karlow a resident of either place now?

Ans. No, sir.

C. E., 85 Ques. How long since he ceased to be a resident of either place?

Ans. Between 1 and 2 years—something over a year since he went away.

C. E., 86 —. Is Lind, the Norwegian, a resident of either place now?

Ans. Yes, sir, of Tacoma.

C. E., 87 Ques. Is Wilson a resident of either place now?

Ans. I don't know—Wilson went to Oregon some time ago—I don't know whether he has returned or not.

C. E., 88 Ques. How long did Wilson live here?

Ans. Wilson was at Tacoma some years ago—went away—and come back again—was here about time of location or shortly after.

C. E., 89 Ques. What location do you refer to?

Ans. The location of the railroad.

C. E., 90 Ques. What was Wilson's business or occupation?

Ans. I do not know—could not tell you.

C. E., 91 Ques. He did not have, to your knowledge, any business or occupation, did he?

Ans. Not that I am aware of.

C. E., 92 Ques. You say he wanted to purchase the tract of land in question here; have you any reason to believe that he had any means with which to purchase any land?

Ans. He wanted to buy a part only—he did not promise to buy it all—and said he had the coin to pay.

C. E., 93 Ques. What led to his sa ying he had the coin to pay—did you ask him?

496 (Plaintiff's attorney objects to this as immaterial.)

Ans. Another man said in Wilson's presence he wanted to buy—had not the money and wanted time—this led Wilson to say he had the money.

C. E, 94 Ques. Who was that other man?

Ans. A millman at Tacoma.

C. E., 95 Ques. Is that the most definite description you can give of him?

Ans. No, sir.

C. E., 96 Ques. What is the most definite description you can give of him?

Ans. I have his name in some papers I have in the country, but not here.

C. E., 77 Ques. What is the business or occupation of the Norwegian to whom you refer?

Age. He is a millman.

C. E., 98 Ques. How long has he resided in Tacoma?

Ans. I do not know how long he has been in the mill at Tacoma; I think I have known him 3 or 4 years, possibly 5 years.

C. E., 99 Ques. That is the whole extent of his residence in this part of the country, to your knowledge, is it not?

Ans. He has worked for Hanson and Co. as long as I have known him.

C. E., 100 Ques. Is the Mr. Smart you refer to a resident of either town now?

Ans. He lives in New Tacoma.

C. E., — Ques. How long has he lived here?

Ans. I do not know.

C. E., 102 Ques. When did he talk to you about buying this tract of land?

Ans. At various times during the last few months.

C. E., 103 —. George E. Atkinson, whom you give as one
497 of the parties; is he a resident of this place now?

Ans. He lives in Tacoma.

C. E., 104 Ques. When did he talk to you about buying this land, and make those reflections on the difficulty of a poor man establishing his claim legally?

(Plaintiff's attorney objected, on the ground that it assumes that the party named in question did cast reflections, etc., which has not been established.)

Ans. To the first part of the question, when he first talked about buying the land, was three or four months ago.

C. E., 105 Ques. Then, Mr. Carr, of all those parties whom you have named as being ready, in the year 1873, to purchase from you the tract of land in question, three are not residents of Tacoma or New Tacoma now; and, of the other three, one has been here but a short time, you say; another, three or four years; and the remaining man first spoke to you about three or four months ago?

(Objected to by plaintiff's attorney because it assumes the date upon which the parties desired to buy to be in 1873, when such has not been testified to.)

Ans. I did not say that these offers occurred in 1873—some of the parties came along since—I received offers in 1873 from some of those and from others.

C. E., 106 Ques. Now, Mr. Carr, from your present recollection, how many of those parties whom you have named made the offers you referred to in 1873, and what are the names of the parties who made the offers to you on that year?

(Plaintiff's attorney objects because immaterial and irrelevant, not in cross-examination, and that if counsel insists on answers to these questions, he makes the witness his own.)

Ans. Of the names I have mentioned, Steele made me an offer that I recollect distinctly. I can give more names—Craig
498 wanted to buy, Cosgrove wanted to buy, Pincus wanted to buy, but for that—J. H. Ramsdell said he would buy but for that.

C. E., 107 Ques. Of the six men whom you named in your previous testimony as having talked to you about buying that land, only one, Steele, spoke to you in 1873 about it, and Steele is not now a resident of this county, or of this Territory as far as you know?

(Objected to for same reasons as above.)

A. I ain't sure but what Karlow wanted to buy in 1873, I think he did.

C. E., 108. Ques. Karlow, too, has left this part of the country, has he not?

Ans. Karlow lives east of the mountains, I believe.

C. E., 109 Ques. Have you not, Mr. Carr, a singular faculty for recollecting, in support of your testimony, the acts and talks of dead men and absent men?

(Objected to—immaterial and irrelevant.)

Ans. I do not see anything remarkable; I mentioned those I had talked with.

C. E., 110 Ques. You spoke of Craig and Cosgrove as having also talked to you about buying that land in 1873; are they residents of this place now?

Ans. No, sir.

C. E., 111 Ques. Are they both living?

Ans. No, sir.

C. E., 112 Ques. Are they both dead?

Ans. Yes, sir.

C. E., 113 Ques. Then, Mr. Carr, as all the support to which you appeal in your testimony lies beneath tombstones, I will ask you whether you took up the whole quarter section, when you took up the claim of which the tract in question is a part?

499 (Plaintiff objects—wholly immaterial and irrelevant—not responsive to any examination-in-chief, and has nothing whatever to do with the issues involved herein.)

Ans. That requires two answers—I did not take up a whole quarter section—my claim was not 160 acres.

C. E., 114 Ques. How many acres was it?

(Same objections by plaintiff's attorney.)

Ans. One hundred and forty-seven acres.

C. E., 115 Ques. Were you a married man in the summer of 1873?

Ans. Yes, sir.

C. E., 116 Ques. Did you live together with your wife, in the ordinary relations of husband and wife?

(Plaintiff objected to both of above questions because not cross-examination—not responsive to anything brought out in chief.)

Ans. That is a private matter.

C. E., 117 Ques. Do you refuse to answer the question, Mr. Carr?

Ans. I would rather not, unless imperatively necessary.

C. E., 118 Ques. It is imperatively necessary, and I require an answer to it.

Ans. I did not live happily at that time.

C. E., 119 Ques. At what particular time did you live unhappily?

(Plaintiff objected same as above.)

Ans. From early in the year 1873, thenceforward.

C. E., 120 Ques. You lived with your wife in the same house that year, or the greater part of it?

(Plaintiff objected same as above.)

Ans. Part of the year, perhaps half of the time.

500 C. E., 121 Ques. What time in 1873 did you cease to live with your wife in the same house?

(Plaintiff objected as above.)

Ans. This is very disagreeable to me. I do not want to open old sores, which cost me a lifetime to heal up.

C. E., 122 Ques. Answer the question.

(Plaintiff's attorney objected as above. Notice given by plaintiff's attorney that by these questions witness is made a witness for defendant.)

Ans. I was at home and absent by turns all of the year 1873.

C. E., 123 Ques. I must insist on your answering the question.

(Objected to as before by the plaintiff's attorney.)

Ans. I presume I lived with her all the year. We separated permanently in January, 1874.

C. E., 124 Ques. Did you keep house all the year 1873?

(Objected to by plaintiff's attorney.)

Ans. Yes, sir.

C. E., 125 Ques. During all that year your wife was your housekeeper, and discharged all household duties usually incumbent on wives; did she not?

(Objected to by plaintiff as above.)

Ans. She was my housekeeper.

C. E., 126 Ques. Where were you on the 25th day of June, 1873?

(Objected to as above.)

Ans. I was at home.

C. E., 128 Ques. And on the 27th of the same month?

(Objected to by plaintiff as above.)

Ans. Yes, sir.

C. E., 129. Ques. And on the 28th?

(Objected to by plaintiff as above.)

501 Ans. Yes, sir.

C. E., 130 Ques. And on the 29th?

(Objected to as above.)

Ans. Yes, sir.

C. E., 131 Ques. And on the 30th?

(Objected to by plaintiffs as above.)

Ans. Yes, sir.

C. E., 132 Ques. Were you in your house on the 30th day of June, 1873, on either of the two occasions upon that day when Mr. Edward

S. Smith, on behalf of the Northern Pacific Railroad Company, called there to deliver to you in person the notice from the vice-president and managing director of that company for the Pacific coast, that that company had accepted the proposals and agreed to comply with the conditions contained in the trust deed made by you and your wife to Lewis M. Starr, as trustee for the Northern Pacific Railroad Company, on the 14th day of November, 1872, and extended by your extension deed dated May 24th, 1873, of which notice I hand you a copy?

(Copy of Exhibit A, Theodore Hosmer's deposition. Marked in this deposition Exhibit K.)

(Plaintiff's attorney renewed same objection to this question; and further, the question assumes that E. S. Smith was there, and there is no testimony to that effect that he was there.)

Ans. I was at home on the 30th day of June, 1873, and never saw that paper, nor one like it, before to-day, nor at any time nor under any circumstances.

(Plaintiff's attorney moves to strike out question and answer for the reasons following:)

C. E., 133 Ques. I now ask you, Mr. Carr, to answer my question directly. Were you in your house upon either of the two occasions referred to in my last preceding question?

(Plaintiff's attorney objects on the grounds: That it is calling upon the witness to take for granted that two particular occa-
502 sions did occur of which there is no evidence, and only assumed by counsel; and that such question cannot be directly answered by witness.)

Ans. I was at home on the 30th day of June, 1873.

C. E., 134 Ques. Do you mean by the phrase at home the house where you and your wife lived together?

Ans. Yes, sir.

C. E., 135 Ques. How can you recollect so distinctly ten years back that you were in your house all that day?

Ans. By occurrences in my private family that then took place.

C. E., 136 Ques. State what those occurrences were which tended to make so lasting an impression upon your mind, Mr. Carr.

Ans. They were of a private nature and very harrowing, and I would rather not.

C. E., 137 Ques. If they were not of a criminal character on your part, and liable to subject you to indictment or to penalties, I must insist on an answer.

Ans. They were not of a criminal nature; but no man wants his family secrets bared; at least I don't.

C. E., 138 Ques. If they were not of a criminal nature, you will state them, Mr. Carr.

Ans. My wife was near confinement, and had a fall, and was very poorly; she fell off the steps, and needed to be waited upon.

C. E., 139 Ques. Did you consider the nearness of your wife to confinement as so discreditable a circumstance in your family life, that you shrank from alluding to it, and characterize it as very harrowing? Or do you consider the fall that you claim occurred as being very discreditable to you or her?

Ans. I had trouble with my wife.

C. E., 140 Ques. I ask you to answer my question.

503 Ans. I do not consider the fall discreditable. It was an accident.

C. E., 141 Ques. Then, Mr. Carr, you consider your wife's nearness to confinement as being a discreditable circumstance in your family life?

Ans. No, sir.

C. E., 142 Ques. What do mean, then, by saying, in answer to cross-question No. 135 and cross-question No. 136, that those two occurrences, viz: the nearness of your wife to confinement and her having fallen on the steps, were of a nature so private and harrowing that you were reluctant to answer the question concerning the reasons for your distinct recollection of being at home on that day?

Ans. I do not wish to be understood as saying that I consider her condition or her fall as disgraceful in themselves, but other things that occurred in connection therewith, or I would say with my own affairs.

C. E., 143 Ques. Mr. Carr, you have just said that your wife's condition and the fall alluded to were the occurrences which made so lasting an impression that you recollect that day distinctly after a lapse of nearly ten years, and that you were at home in your house all that day. Is it a fact that those two circumstances or occurrences made so deep an impression upon your mind?

Ans. Those circumstances did make a deep impression on my mind.

C. E., 145 Ques. At what time of the day did the fall occur which you claim your wife suffered?

Ans. It was in the morning, about breakfast time, just after breakfast or just before; I cannot recollect to a minute. I recollect the occurrence; she was nearly miscarried; I had to attend to her myself.

C. E., 146 Ques. Did that fall disable her at once from

504 moving around the house and attending to her customary duties?

Ans. Yes, sir.

C. E., 147 Ques. Was she obliged to take to her bed at once on the occurrence of the fall?

Ans. Yes, sir.

C. E., 148 Ques. Did she remain in her bed all day then?

Ans. Yes, sir.

C. E., 149 Ques. Did you summon medical aid to her attendance and treatment?

Ans. No, sir. I put her to bed myself and attended to her.

C. E., 150 Ques. Are you a physician or man midwife yourself, Mr. Carr?

Ans. I am not a physician, but I have always attended to her confinement myself without assistance. Ordinary cases I can attend to.

C. E., 151 Ques. Then you have a great deal of confidence in your own skill as a man midwife?

(Objected to by plaintiff's attorney as immaterial and irrelevant; witness not competent to judge of his own skill.)

Ans. Sufficient confidence to attend to my own wife at all times.

C. E., 152 Ques. Did you consider that, with your wife just suffering from a fall which threatened her with miscarriage, your own skill, practice and experience as a man midwife were so thorough and extensive that it was perfectly safe for her to have you take sole charge of her treatment?

(Same objections as before by plaintiff's attorney.)

Ans. I considered myself competent to take care of her.

C. E., 153 Ques. Was she so convinced of your skill and experience in that line of business as to feel satisfied that no further skill or experience of physician or professional midwife was necessary?

505 (Same objections as before. Further, witness is asked to state opinion of another.)

Ans. Yes, sir.

C. E., 154 Ques. You succeeded in averting the threatened miscarriage, then, Mr. Carr?

Ans. Yes, sir.

C. E., 155 Ques. Did you call any one whomsoever to your house on that day to lend assistance?

Ans. No, sir.

C. E., 156 Ques. How long was your wife obliged to keep to her bed after that fall, Mr. Carr?

(Same objections by plaintiff's attorney.)

Ans. Three or four days, as near as I remember.

C. E., 177 Ques. What limb, if any, of hers was particularly injured by the fall; or what part, if any, of her body was defaced by it?

Ans. The limbs were not injured; the injury was internal.

C. E., 158 Ques. How did she fall, Mr. Carr?

Ans. Down the steps, at the door.

C. E., 159 Ques. She fell forward, down the steps of your door, did she?

(Same objections by plaintiff's attorney.)

Ans. I did not see her fall.

C. E., 160 Ques. Where did she fall, and in what manner; whether forward or backward?

(Plaintiff objects as above.)

Ans. She fell down the steps; I don't know in what shape she fell.

C. E., 161 Ques. Down what steps, Mr. Carr?

Ans. The steps of my house, where we lived.

C. E., 162 Ques. Were they the front door steps?

Ans. Yes, sir.

506 C. E., 163 Ques. How many steps were there at that time, and are there now to your front door?

Ans. There were four steps then.

C. E., 184 Ques. What was the character of the ground at the foot of those steps?

Ans. Ordinary ground; flower beds with board border set on edge on one; brush and stumps on the other.

C. E., 165 Ques. I ask you, Mr. Carr, the character of the ground at foot of steps, where she would have fallen, not upon the sides.

Ans. She fell off the side of the steps.

C. E., 166 Ques. I asked you to answer my question, Mr. Carr.

Ans. There were two boards laid at the bottom of the steps, as you walk down the steps.

C. E., 167 Ques. What was the character of those boards, rough or planed?

Ans. If I remember right they were two pieces of flooring.

C. E., 168 Ques. When you said at first, Mr. Carr, that your wife fell down the steps, did you mean to convey the impression that she fell forward, straight down the steps towards and on the path, leading from your door?

(Plaintiff objected as above.)

Ans. No, sir.

C. E., 169 Ques. How did you come, Mr. Carr, to avoid stating that she did not fall down the steps, but to the side, as you now claim?

(Plaintiff notes same objection.)

Ans. I did not avoid it.

C. E., 170 Ques. Do you mean to say that you first said she fell off to the side of the steps, and not down them?

(Plaintiff notes same objection.)

507 Ans. I said I did not see her fall; she told me she had fallen.

C. E., 171 Ques. Then, Mr. Carr, you found her lying there, and she was so badly injured she was unable to get up, was she?

Ans. Yes, sir.

C. E., 172 Ques. How long did she lie there before you came to her assistance and raised her from her prostrate condition?

Ans. Only a few minutes.

C. E., 173 Ques. Was she insensible when you found her lying in that state?

Ans. No, sir.

C. E, 174 Ques. You say she was unable to get up?

Ans. Yes, sir; I carried her in.

C. E., 175 Ques. She had not lost the power of speech, had she?

Ans. No, sir.

C. E., 176 Ques. How did you discover she had fallen and was lying there unable to raise herself?

Ans. I was out the back door and come in and missed her; looked in the bedroom and did not see her; went to the front door and saw her lying there groaning and crying.

C. E., 177 Ques. Then at that time, Mr. Carr, the relations between yourself and your wife—at least on your part towards her—were so intensely affectionate that you missed her presence and company from you, in an instant, and rushed from the house to find where she was?

Ans. I had occasion to speak to her; missed her; looked in the room for her and I looked at the front door.

C. E., 178 Ques. As that was one of the occurrences on that day which made so permanent an impression on your mind, you can probably recall what that occasion was which you had to speak to her?

508 Ans. I do not know that I can recall that subject now, the subject I was speaking to her about; it might have been of importance or it might have been trivial.

C. E., 179 Ques. Did you inquire of her, Mr. Carr, how she came to fall, and what was the manner of her fall?

Ans. I do not remember whether I did or not.

C. E., 180 —. How far advanced in pregnancy was your wife at this time, June 30, 1873?

Ans. About seven and one-half months, I believe.

C. E., 181 Ques. You say for three or four days she was confined to her bed altogether, after that fall?

Ans. Yes, my recollection is 3 or 4 days—she was unable to do any work.

C. E., 182 Ques. You remained in attendance on her during that interval of her sickness?

Ans. Yes, sir.

C. E., 183 Ques. How soon, after she was able to get up, did she resume her household duties?

Ans. Three or four days after she got hurt, she commenced to do the work with my assistance.

C. E., 184 Ques. You were obliged to remain at home during all that interval she was confined to her bed, and for some time after she acquired strength enough to get up?

Ans. Yes, sir.

C. E., 185 Ques. How long was that altogether—a week or ten days?

Ans. I continued to assist her more or less all the time. She never recovered fully; was threatened with miscarriage at any time until after her confinement.

C. E., 186 Ques. Then you were obliged for a week or ten days after 30th of June to remain in the house about all the time?

Ans. I cannot state just how long—I do not just now re-
509 member the exact number of days.

C. E., 187 Ques. On the morning of the 30th of June, when you say this fall occurred, you are not quite sure whether it occurred just before breakfast, or just after; can you not settle that fact in your mind, by recalling whether you ate breakfast after finding her prostrate and helpless, outside of the house?

Ans. Well, it was about breakfast time; I might have got it myself, or she might have got it. I am sure she ate breakfast that morning.

C. E., 188 Ques. Did you go out of the house at all for any length of time that day?

Ans. Not that I remember of.

C. E., 189 Ques. Then, Mr. Carr, you would have been pretty likely, if not absolutely certain, to have been present in the house when any agent or representative of the Northern Pacific Railroad Company called there, if any did call, to deliver to you the notice of the company's acceptance of the proposals and conditions set forth in the trust deed to Starr, would you not?

Ans. Yes, if any called there that day I should have seen them; none did call that day.

C. E., 190 Ques. Mr. Carr, do you not know as a fact, and do you not distinctly recollect that Mr. Edward S. Smith called at your house twice or possibly three times on that day, namely, the 30th day of June, 1873, to deliver to you the notice referred to, and that he on the second of those visits, or maybe the third—at all events on the last of such visits—left that notice with your wife for her to deliver to you?

Ans. No, sir; I did not see Mr. Smith on the 30th of June.

C. E, 191 Ques. I wish you to answer the question as I put it. I did not ask you whether you saw Mr. Smith on the 30th of June, but whether you do not know as a fact and distinctly recollect that he did call at your house two or three times on that day
510 for the purpose stated?

Ans. I do not know such thing for a fact.

C. E., 192 Ques. Mr. Carr, did your wife not deliver to you on that day, or on the next, the notice from the Northern Pacific Railroad Company left at your house on the 30th of June, 1873, by Edward S. Smith?

(Objected to by plaintiff's attorney because it assumes that such notice was left there, and that it was so left by Edward S. Smith, which is not established by any evidence up to the present.)

Ans. No, sir.

C. E., 193 Ques. Did you leave your house at all on the 30th of June?

Ans. If I left it at all, it was only for a few minutes.

C. E., 194 Ques. Can you recall, if you left at all, where you went to and how far from the house?

Ans. Probably I went to the spring or creek from which I brought water—that was the farthest away.

C. E., 195 Ques. How far is that from your house?

Ans. Well, about 200 feet, as near as I can remember.

C. E., 196 Ques. Do you recollect, Mr. Carr, if you went to the spring at any time that day for water, whether you met or talked with anybody on the way?

Ans. Not that I remember.

C. E., 197 Ques. Do you remember leaving your own house at any time on the 1st July, 1873?

Ans. Only for a short time.

C. E., 198 Ques. Where did you go during that short time?

Ans. Probably for wood or water, or to attend to a call of nature.

C. E., 199 Ques. Now, Mr. Carr, did you not on the 30th of June, 1873, expect the service upon you of a notice from the Northern Pacific Railroad Company, through its vice-president and managing director for the Pacific coast, accepting and agreeing
511 to comply with the proposals and conditions of your trust deed to Mr. Lewis M. Starr, and your extension of the same?

Ans. No, sir.

C. E., 200 Ques. Did you not, Mr. Carr, in anticipation of the service of such notice, actually secrete yourself in your house on the 30th of June, 1873, and direct your wife to say to Mr. Edward S. Smith, when he came with the notice, that you were out?

A. No, sir; I did not. I don't do such things. I don't secrete myself from anybody.

C. E., 201 Ques. Were you not, Mr. Carr, as a matter of fact in your own house on that day on each of the occasions when Mr. Smith called for the purpose already described, and did you not purposely keep yourself out of his sight with a view to evade the service of that notice upon you personally?

Ans. That requires two answers. To the first part of it, I was in my house on that day; I did not secrete myself from Mr. Smith, nor was Mr. Smith there to my knowledge.

C. E., 202 Ques. Did you keep equally close to your house on the 2d day of July, 1873, as you did according to your testimony on the two preceding days?

Ans. Yes, sir; about the same.

C. E., 203 —. Did you keep equally close on the 3d of July?

Ans. Yes, sir; I was at home all day, the same.

C. E., 204 —. Did you not on either of those days go further from your house than the spring or creek?

Ans. I might have gone some farther away; I was not gone long at any time.

C. E., 205 Ques. In any of these possible absences during those days, do you recollect distinctly of having met anybody, talked with anybody?

Ans. I remember now speaking to one of my neighbors about my wife being sick.

512 C. E., 206 Ques. Is that the only distinct recollection you have of speaking to any one on those days, outside of your wife?

Ans. I spoke to very few I remember, until the third. On the 3d of July I talked with quite a number of different people.

C. E., 207 Ques. What was the occasion of your sudden emergence from obscurity and talking with so many people on that day?

(Plaintiff's attorney objects to phraseology of the question by insinuating therein he kept himself secreted, "emerged from obscurity.")

Ans. People came to me on that day and talked about railroad subsidy; wanted me to give bond for bonus to the railroad.

C. E., 208 Ques. This was all at your own house. You say they came to you?

Ans. Yes; at my house.

C. E., 209 Ques. About how many came to you; you say different people came that day?

Ans. Seven or eight—maybe more.

C. E., 210 Ques. Do you recollect what was the particular reason why so many persons called at your house on that day to urge you to give bond for bonus to the railroad company?

(Plaintiff's attorney objects to anything which transpired after the 1st day of July, 1873, as immaterial and irrelevant.)

Ans. Yes, sir.

C. E., 211 Ques. Who were those persons, Mr. Carr?

Ans. General McCarver, John W. Ackerson, E. S. Smith, George O. Kelly, George E. Atkinson, a man named Shannon—I do not know his first name; they called him Railroad Shannon—William Ackerman, Job Carr, my father. There was a Portland man—I cannot call his name now. I am safe to say there were others, but I cannot recall their names—there were one or two strangers with whom I was not acquainted.

513 C. E., 212 Ques. Did they all come in a body to your house?

Ans. No, sir.

C. E., 213 Ques. Did they all come separately?

Ans. Not always; usually come in couples.

C. E., 214 Ques. Were they all there at the same time?

Ans. All the same day—not all at one moment.

C. E., 215 Ques. About how many do you recollect of the persons you have named as having been together at one moment at your house on that day?

Ans. I recollect of three being there at once.

C. E., 216 Ques. Who were those three?

Ans. McCarver, Starr and my father.

C. E., 217 Ques. McCarver is dead, is he not?

Ans. Yes, sir.

C. E., 218 Ques. Did all those different persons whom you have named come to your house on that day without any preconcerted arrangement among themselves or with you, for the purpose you have stated?

Ans. No arrangement with me. I do not know whether there

was any arrangement among themselves; I could not say as to that.

C. E., 219 Ques. You say that they all came for the same purpose, Mr. Carr?

Ans. They made the same purpose known to me.

C. E., 220—. You said your wife was confined to her bed all that day in consequence of a fall on the 30th of June?

Ans. Yes, sir; except when I lifted her up and had her out; she was not able to work on the 3d of July.

C. E., 221 Ques. You transacted no business on that day, the 3d of July, 1873, except attendance upon your wife and conversation with those persons, did you?

Ans. Yes; I did.

C. E., 222 Ques. What was it, if you recollect?

Ans. Getting a deed from L. M. Starr and conversation
514 about making another bond.

C. E., 223 Ques. How many persons were present when you got that deed from L. M. Starr, as you say?

Ans. I did not get the deed direct from Starr in person.

C. E., 224 Ques. I asked you how many persons were present when you got the deed from L. M. Starr as you say on that day?

Ans. Three beside myself.

C. E., 225 Ques. Name them.

Ans. McCarver, my wife, my father.

C. E., 226 Ques. Who gave you the deed?

Ans. My father.

C. E., 227 Ques. McCarver is dead you say; is he not?

Ans. Yes, sir.

C. E., 228 Ques. Is your wife then, now living?

Ans. No, sir, so I am told; I did not see her dead body.

C. E., 229 Ques. When did she die, according to your knowledge or information?

Ans. Some four or five months ago.

C. E., 230 Ques. Where was she at the time of her death, Mr. Carr?

(Objected to by plaintiff's attorney as hearsay.)

Ans. In California.

C. E., 231 Ques. In what part of California?

(Same objection noted.)

Ans. At some mineral springs there—I forget the name.

C. E, 232 Ques. Did you not take sufficient interest in the name of the place where your wife died to recollect it so short a time after her death?

Ans. No, sir.

C. E., 233 Ques. Can you not by any effort of recollection give the name of the place?

Ans. No, sir; I do not remember now the name of the place.

515 C. E., 234 Ques. If you cannot recollect a fact like that a few months back, how can you claim to recollect distinctly facts of apparently less consequence or interest ten years back?

Ans. Ten years ago she was my wife; five years ago she was not.

C. E., 235 Ques. Was it five years ago she ceased to be your wife?

Ans. More than that.

C. E., 236 Ques. How much more?

(Objected to by plaintiff's attorney—matter of record.)

Ans. Since the 9th of September, 1876—that is the date of decree of my divorce.

C. E., 237 Ques. How long before that date had you and she ceased to live together as man and wife?

Ans. We separated in January, 1874.

C. E., 238 Ques. Are you sure of that, Mr. Carr?

Ans. Yes, sir.

C. E., 239 Ques. Was it not in the month of January, 1875, that you and your wife ceased to live together?

Ans. No, sir; in 1874 she left.

C. E., 240 Ques. I asked you not when she left, but whether it was not in the month of January, 1875, that you and your wife ceased to live together?

Ans. No, sir; my recollection is that it was in 1874.

C. E., 241 Ques. Was not that an event in your life so important and interesting to you that you would be likely to recollect the exact date of its occurrence, if it is possible for you to recollect anything at such a distance of time?

Ans. It was in January, 1874. (Corrected June 16th, 1883, by inserting 1875 for 1874.)

(SATURDAY, *June 16th*—10 a. m.)

The witness desired to correct answer to C. E., Ques. 241: "I wish to change 1874 to 1875." Witness stated as follows: "Last evening, after answering last question, I went to the water-
516 closet, and upon reflection as to dates I found I had answered wrong. I returned and the court had adjourned, or I should then have corrected the answer. I now wish the answer to read January, 1875, instead of January, 1874." (Correction entered, see C. E. 241—answer.)

C. E., 242 Ques. Was it not in conversation with people since the adjournment of this court yesterday, or upon consultation of the county records, rather than by reflection in the water-closet, that your memory has been so refreshed this morning as to enable you to give January, 1875, instead of January, 1874, as the time at which you and your wife ceased to live together?

Ans. No, sir; I told the truth when I corrected the record.

C. E., 243 Ques. Have you talked with anybody since the adjournment yesterday about that day?

Ans. Nobody in this town—a few words with my father at the old town.

C. E., 244 Ques. Was it not your father, rather than the water-closet, who put you on the track of the right date?

Ans. No, sir; I made up my mind here, while I was out of the room, last evening.

C. E., 245 Ques. Don't you think then, Mr. Carr, in view of the effect of the water-closet on your mnemonic faculties, and in view also of the character of your answers throughout your cross-examination, that it would conduce greatly to your honesty and trustworthiness as a witness if you were to spend five months, day and night, in a water-closet?

(Plaintiff's attorney instructed witness to decline answering the question.)

Ans. I did not understand that word "mnemonic," or what the attorney said—beside that I regard the question as an insult, and decline to answer it.

C. E., 246 Ques. I now repeat, Mr. Carr, the substance of the last interrogatory addressed to you yesterday; viz. Ques. 141,
517 Whether your separation from your wife, Josephine Carr, was not an event in your life so important and interesting to you that you would be likely to recollect the exact date of its occurrence, if it is possible for you to recollect anything at such a distance of time?

(Plaintiff's attorney objected—irrelevant and immaterial—and not proper cross-examination.)

Ans. It was important, but not interesting—I do remember the time, but I try to forget it.

C. E., 247 Ques. In trying to forget it, Mr. Carr, would you not be the more likely to keep it fresh in your mind?

Ans. No, sir.

C. E., 248 Ques. If you cannot without the aid of a water-closet recall within one year the date of such an occurrence as your separation from your wife, do you think it — all likely that you can recollect to a day ordinary events of minor interest and importance occurring at a greater distance of time than that separation?

(Attorney for plaintiff instructs witness to decline answering that question upon the grounds that it is a question calculated and intended to place the witness in a ridiculous light before the court, and also calculated to annoy and disturb the witness.)

Ans. By advice of my attorney I decline to answer the question.

C. E., 249 Ques. If you cannot without reflection recall within one year the date of such an occurrence as your separation from your wife, do you think it at all likely that you can recollect to a day ordinary events of minor interest and importance occurring at a greater distance of time than that separation?

Ans. It is difficult to answer even when I do understand it. It is owing to what the events are and what effort one makes to remember, and whether they are careless in their mind or not.

C. E., 250 Ques. Is not your claim on this cross-examination,

that you distinctly recollect to a day or hour minor events or details which you say occurred about ten years ago, another illustra-
518 tion of your tremendous power as a witness in the way of wholesale and comprehensive swearing, of which I understand you proudly boast?

(PLAINTIFF'S ATTORNEY—The witness will decline to answer the question upon the ground that the question is calculated and intended to confuse and improperly irritate the witness—that it indirectly insinuates that he is a wholesale swearer of falsehoods and proudly boasts of it.)

Ans. If the question is put in a shape so I can I will answer it—one question at a time, not two or three together.

C. E., 251 —. Have you not in the course of a trial before a justice of the peace in Pierce county boasted with pride of your power as a swearer?

(Objected to by plaintiff's attorney as it does not name justice of the peace, nor name when, also immaterial and irrelevant.)

Ans. No, sir.

C. E., 252 Ques. You said yesterday that on the 3d July, 1873, your wife was still so feeble from the effects of the fall which you say she suffered on the 30th of June, that she was unable to get out of bed, and that she was confined all day to her bed, except when you lifted her up or out. While those different persons you have named were at your house on that day, were any of the conversations concerning subsidy to the railroad or any other business matter carried on in her presence?

(Plaintiff's attorney here interposed to protect the plaintiff's rights herein; requests witness to decline to answer any question as to facts that occurred after the 1st day of July, 1873, for the reason that it is calling from the witness testimony in regard to matters and things for which he will probably be called in rebuttal. That said attorney cannot permit counsel for the defendants, under the plea of cross-examination, to examine his witness in advance as to matters and things which from the status of the pleadings it seems necessary for them to produce some testimony thereof themselves. That the only two points and the only matters upon which I have examined the witness-in-chief are in regard to the fulfillment
519 of one of the conditions of the trust deed from the witness and wife to L. M. Starr, namely, the condition of notifying the witness of their acceptance, etc., unless peremptorily commanded by referee to answer the question. Witness voluntarily answered.)

Ans. She might have heard some of it—I cannot say.

C. E., 253 Ques. Were any of the conversations carried on in the same room where she was, and while she was in that room?

Ans. They might have been.

C. E., 254 Ques. Do you know as a fact whether they were?

Ans. No; I cannot state under oath that she heard any of it, or that she did not.

C. E., 255 Ques. I did not ask you whether she heard any of it, but whether the conversations, or any of them, were carried on in the room in which she was?

Ans. Well, I do not really remember as to that.

C. E., 256 Ques. Can you give, Mr. Carr, the order of time on that day in which the persons named by you called at your house?

Ans. No, sir; I cannot.

C. E., 257 Ques. You say that Lewis M. Starr was among the callers that day, and that your father gave you a deed. What was the purport of that deed?

Ans. He was among the callers that day. It was a deed of release from Starr as trustee back to me of said land.

C. E., 258 Ques. Witness handed paper (marked Exhibit L). Do you recognize this paper as a copy of the deed or paper which you say your father gave you as coming from Lewis M. Starr?

Ans. It is not a correct copy of deed.

C. E, 259 Ques. In what respect is said copy incorrect?

Ans. The certificate of record claims to have it recorded a month before it was executed.

C. E., 260 Ques. What time did the deed or paper which you say your father gave you as from Lewis M. Starr, purport to have been executed?

520 Ans. It was executed on the 3d of July, 1873.

C. E., 291 Ques. I asked you what time it purported to have been executed?

Ans. The third day of July, 1873; that is all I can say.

C. E., 262 Ques. In what custody was that deed or paper before it came into your father's possession and he gave it to you?

Ans. I cannot say; my father told me that Starr gave it to him.

(Defendant's attorney moves to strike out the words, "My father told me that Starr gave it to him." Not a responsive answer and hearsay. Exhibit L offered in evidence.)

Plaintiff's attorney objected to admission on the following grounds: Because the same is not authenticated according to law.

MONDAY, *June 18th*, 1883—10 a. m.

Present as before.

C. E, 263 Ques. When on the 3d of July, 1873, your father as you say gave you, as coming from Lewis M. Starr, the paper purporting to be a quitclaim deed to you, and which is marked in this examination as "Exhibit C," was it executed to you and your wife as grantees?

(Plaintiff's attorney objects on the ground that the deed speaks for itself.)

Ans. The question is in legal language so that I do not understand it. The understanding was that the deed was a release from

Starr to me of the land. That is what I asked for and that is what I supposed I got.

C. E., 264 Ques. Now, Mr. Carr, in order to make the question entirely intelligible to you, I will ask you whether when that deed or paper was given to you by your father, your name and the name of your wife as the persons to whom and in whose interest the deed or paper was made were already written in it?

(Objected to as immaterial and irrelevant and that deed speaks for itself—and that the allegations of defendant's answer and cross-bill set up no facts of that kind.)

Ans. Well, do you mean written in it, before the deed was
521 signed? Already comprehends a vast deal of ground. Already when—that is what I want to get at.

C. E., 265 Ques. I mean, Mr. Carr, as I think you know very well, to ask you whether when the deed was handed to you by your father, your name and your wife's name were then in it as the grantees?

Ans. Yes, sir. My name and my wife's name were in it. The deed was filled out and Starr had signed it.

C. E., 266 Ques. Is not your name, wherever it, or any pronoun referring to it, appears in that paper, written in your handwriting?

Ans. Yes, sir; I think the deed is in my own handwriting.

C. E., 267 Ques. When did you write it, Mr. Carr?

(Objected to as immaterial and irrelevant and not cross-examination.)

Ans. The same day and before it was executed.

C. E., 268 Ques. Then your father did not bring you a deed executed by Lewis M. Starr, but a paper on which his name was written, and which you yourself filled out over that name?

Ans. I filled the body of the deed—then my father took it to the store of Ackerson and Starr signed it. Atkinson executed it. My father brought it back to me. I did not fill a deed over Starr's signature. I would not do such a thing.

C. E., 269 Ques. You say that Mr. Starr was at your house that day, Mr. Carr?

Ans. Yes, sir.

C. E., 270 Ques. Which was it, before or after his signing of that paper in Ackerson's store that he was at your house?

Ans. Before. He was not there after.

C. E., 271 Ques. Now, Mr. Carr, what was that agreement, consideration, or inducement which led to Lewis M. Starr's signing that paper?

(Plaintiff objected—immaterial, irrelevant, and that no understanding, agreement or inducement for the execution of that deed by Starr to plaintiff is anywhere alleged in cross-bill or answer or agreement of defendants.)

522 Ans. There was no agreement. I was besought to subsidize the company, but I would not agree to do anything until Starr had released the land; I had made the bond to him.

(Correction by witness' request. E. E.)

C. E., 272 Ques. Now, Mr. Carr, what did you agree to do upon his releasing to you?

(Plaintiff objected on ground that it assumes the witness did agree to do something.)

Ans. I made no agreement before he made the deed—I asked for a release. "After I get his release, I'll talk subsidy to you." This was repeated numerous times that day.

C. E., 273 Ques. What agreement did you enter into after you got the release from Starr?

Ans. After a great deal of talk, for I was opposed to subsidy, I agreed that if Ainsworth would give me satisfactory personal bonds, I would give him 40 acres of ground. No mention was made of this 40 acres nor understood.

C. E., 274 Ques. You mean that you would give it to Ainsworth for the Northern Pacific Railroad Company?

Ans. No, sir.

C. E., 275 Ques. For his own private benefit?

Ans. Among the talk held on the subject, I was told that Ainsworth was a very influential man, and that he wanted to get some land at Tacoma, or more land as the case may be, and I asked for a pass over the railroad, in pay for this land, and then he might do as he pleased with the land for all that I cared. This was in addition to the bonds he was to give me.

C. E., 276 Ques. Then you considered a pass over the road as the chief consideration to you for conveying the land to Ainsworth?

Ans. No, sir—not the chief.

523 C. E., 277 Ques. It was one of the considerations though?

Ans. Possibly.

C. E., 278 Ques. What position did Ainsworth then hold in relation to the Northern Pacific Railroad Company?

Ans. He was reported to be managing director of the Pacific division.

C. E., 279 Ques. What was the other consideration beside a pass?

Ans. To locate the railroad at Tacoma was one.

C. E., 280 Ques. Now, Mr. Carr, was it not the understanding and agreement that Lewis M. Starr should give a quitclaim deed in order to enable you to convey directly to the Northern Pacific Railroad Company the land in controversy here?

Ans. No, sir; no such agreement was mentioned in my hearing.

C. E., 281 Ques. Did you execute the deed to Ainsworth for the forty acres which you say you promised in consideration of Starr's release to you?

(Plaintiff objected on the ground not cross-examination. Further it assumes witness did agree that witness should execute the deed,

in consideration of Starr's release, etc., which has not been established by the evidence.)

Ans. I made no agreement conditional on a deed from Starr. I did execute a bond for forty acres, but did not deliver it, for he did not offer his bond to me as agreed.

C. E., 282 Ques. Where is the bond that you executed on that date for the forty acres?

Ans. My attorney has it.

C. E., 283 Ques. Mr. Carr, will you produce that bond to the referee?

Ans. Yes, sir.

C. E., 284 Ques. Please do so.

(Plaintiff's attorney says—I have the paper, but will re-
524 serve till afternoon to consider whether I will at this time produce it. It will be introduced in evidence as part of our case, however.)

(Defendant's attorney insists upon production now, and asks for its production before further progress is made in this examination.)

And now at 11.45 the reference took a recess until 2 p. m.

Afternoon session.

Present as before.

(Defendant's attorney insisted upon the production of the paper referred to by witness in answer to C. E., Ques. 282. Witness remarked there were two bonds one to Ainsworth and one to the Northern Pacific Railroad Company. One was executed and filled out, the other was not. If you mean the bond to Ainsworth my attorney has it not.)

(Attorney for plaintiff objected to this being made part of the record, because the same was but an informal answer to referee and not intended to be given as evidence.)

Witness handed to referee paper marked "Exhibit M," saying, "This is not the paper made to Ainsworth."

C. E., 285 Ques. Mr. Carr, this deed which you have produced appears to have been executed by you and your wife, Josephine Carr, on the 3d day of July, 1873, to Robert R. Thompson, as trustee for the Northern Pacific Railroad Company, and the land it conveys is described as the N. W. ¼ of S. E. ¼ of sec. 8, T. 20 N., 3 E. of the Willamette meridian, containing forty acres more or less, according to the United States survey. Now, where is the deed or bond to Ainsworth which, you say, was drawn up on the same day but not executed by you?

(Plaintiff's attorney objects. 1. Upon the ground that it is not proper cross-examination; 2. That it is new matter entirely upon which the witness has not been examined in chief; 3. That
525 it is immaterial and irrelevant; 4. That the pleadings on either side make no reference to such documents or papers.)

Ans. Not in existence.

C. E., 286 Ques. When did it go out of existence, Mr. Carr?

(Same objections.)

Ans. Same day it was written—3d of July, 1873.

C. E., 287 Ques. In what manner and by whom?

(Same objections.)

Ans. I took it, and threw it in the fire.

C. E., 288 Ques. Had you not signed it before you tore it, Mr. Carr?

(Same objections.)

Ans. No, sir; I never signed it.

C. E., 289 Ques. Did your wife sign it?

(Plaintiff noted same objections.)

Ans. No, sir.

C. E., 290 Ques. Who drew up that deed or bond?

(Same objections.)

Ans. I did.

C. E., 291 Ques. What tract of land did it purport to convey, or obligate you to quitclaim, whichever the condition or obligation was?

(Same objections.)

Ans. The same piece of ground as this, which I hold in my hand; you can take your note from this Exhibit M.

C. E., 291 —. What was the tenor and purpose of that deed or bond to Ainsworth?

(Same objections.)

Ans. One was the location of the road, of the terminus at Tacoma in ten days from the date; another was a pass at will over the railroad for myself; and another was the restoration to me of my homestead.

526 C. E., 293 Ques. What do you mean, Mr. Carr, by your homestead?

(Same objections.)

Ans. My homestead claim.

C. E., 294 Ques. In and to what land?

(Same objections.)

Ans. West ½ N. E. ¼ and E. ½ of N. W. ¼, sec. 2, T. 20 N., 3 east If I am not mistaken—I repeat from memory—at all events my homestead claim, the only I ever had.

C. E., 295 Ques. What do you mean by the restoration of that claim to you, as being one of the conditions of making this deed or bond to Ainsworth, for the tract of land described in this paper marked Exhibit M?

(Same objections.)

Ans. Parties whom I supposed to be directly under Ainsworth's influence or direction had jumped my claim, not that I charge by his direction, but I thought that by his direction would leave it in my possession. That is about the substance of the reasons why I made that one of the conditions.

C. E., 296 Ques. Who were the parties that jumped your claim?

(Same objections.)

Ans. Robert Sproul.

C. E., 297 —. Who else?

(Same objections.)

Ans. No one else jumped it directly. He is the man who brought contest.

C. E., 298 —. Was it one of the conditions of the bond or deed to Ainsworth that Robert Sproul, and whoever else you mean by parties, should restore to you that homestead claim?

(Same objections.)

Ans. Yes, sir.

527 C. E., 299 Ques. State, to the best of your recollection, all of the conditions of that bond or deed from you to Ainsworth.

(Same objections.)

Ans. I think I have, as near as I remember. The pass over the road, location at Tacoma of terminus in ten days, and the clearing out of these parties from my homestead, as it was my opinion, if he told them to go they would go.

C. E., 300 Ques. Now, Mr. Carr, you spoke of a personal bond which Mr. Ainsworth was to give you in return. What was agreed on as the purpose and tenor of that bond from Ainsworth to you?

(Same objections.)

Ans. To do the things recited in substance to the answer to last question.

C. E., 301 Ques. Was Ainsworth at your house on the 3d day of July, 1873?

(Same objections.)

Ans. Not to my recollection.

C. E., 302 Ques. You say that you did not execute this bond to Ainsworth for forty acres, because he did not offer to you his bond as agreed; for I understand from your answer to C. E., Ques. 281, that you refer to Ainsworth's bonds to you, not to L. M. Starr's. Am I correct?

(Same objections.)

Ans. I referred to Ainsworth's, not Starr. He was director; his bond was what I wanted.

C. E., 303 Ques. Did he agree with you to give his bond for the performance of the conditions stated by you?

(Same objections).

Ans. Not to me in person. Most of the business was done by proxy.

C. E., 304 Ques. Who was the proxy in this instance?

528 (Same objections.)

Ans. General McCarver. He was very much interested and excited. He went back and forth a great many times between me and the parties I have mentioned—more particularly Ainsworth. He (Ainsworth) was looked upon as the manager or authority in the business.

C. E., 305 Ques. You said that you destroyed on the 3d of July, 1873, this bond or deed which you had executed to Ainsworth, but had not delivered, because Ainsworth did not offer his bonds to you as agreed. Did the refusal of Ainsworth to give his bond to you reach you from him on the 3d of July, before you had destroyed the deed or bond you had executed to him?

(Same objections.)

Ans. I had written it, and Gen. McCarver had taken it over to them and they refused to accept it, or give me bonds in return, as I was told they had said they would do, for I did not talk to Ainsworth. McCarver brought it back to me and I destroyed it. It had never been signed or executed.

C. E., 306 Ques. When you say Gen. McCarver took the bond or deed from you to Ainsworth over to them, and they refused to accept it or give bonds in return, "as they said they would," whom do you mean by "they" and "them," and what place do you mean by "over"?

(Same objections.)

Ans. By "they" and "them" I mean Ainsworth, Clark, Ackerson, and others who were together; and by "over," I mean over from my house to Ackerson's store, where they were in a body, as I suppose.

C. E., 307 Ques. Were they to join Ainsworth in the bond to you, or was not the bond to be, as you said a while ago, Mr. Ainsworth's personal bond?

529 (Same objections.)

Ans. Ackerson told me himself that he would go bonds that Ainsworth would do what he (Ainsworth) agreed to. He said they would give me bonds. What I wanted was his and Ainsworth's bonds.

C. E., 308 Ques. Was it on that same 3d of July that Ackerson told you that?

(Same objections.)

Ans. Yes, sir; that is my recollection.

C. E., 309 Ques. Was Mr. Ainsworth at Ackerson's store that day while these negotiations were going on?

(Same objections.)

Ans. So I was told. I did not see him.

C. E., 310 Ques. Did you accept Mr. Ackerson's bond for Ainsworth's performance of what he agreed to perform?

(Same objections.)

Ans. He did not tender it.

C. E., 311 Ques. What Ackerson do you mean? Is it John W. Ackerson?

(Same objections.)

Ans. Yes, sir. One of the mill-owners.

C. E., 312 Ques. Do you recollect what time of day he offered to give you his bond for Captain Ainsworth's performance of his agreement?

(Same objections.)

Ans. I cannot remember the time of day now.

C. E., 313 Ques. Did you ask him for his bond to that effect before you destroyed the bond or deed which you say you had executed but not delivered to Ainsworth?

(Same objections.)

Ans. I did not say that I executed a deed to Ainsworth—Ackerson offered his bond himself.

C. E., 314 Ques. Mr. Carr, I will ask the referee to read to
530 you your answer to C. E. Ques. No. 281, in which you say you did execute to Captain Ainsworth a bond for forty acres, but did not deliver it, on account of his not offering his bond to you as agreed.

Referee reads as requested C. E. Ques. and answer 281.

See *ante*.

Referee is then requested by defendant's attorney to read C. E. Ques. 302 and answer, by which the "he" referred — is Mr. Ainsworth, not L. M. Starr.

See *ante*.

Is your memory so defective and untrustworthy that you cannot remember what you said this afternoon in relation to having executed but not delivered a bond or deed to Captain Ainsworth?

(Same objections.)

Ans. I have not said or meant to say that the bond to Ainsworth was ever executed.

C. E., 315 Ques. I ask you now to answer the question whether before you destroyed the bond or deed to Ainsworth, you called

upon Mr. Ackerson to give you the bond which you say he had offered to give.

(Same objections.)

Ans. I asked of McCarver to know of him how about the bonds I was to have. Oh, he said, they would fix that all right some other time. Wanted my bond at once. Then I tore up this paper I had written which I had never executed.

C. E., 316 Ques. I ask you to answer my question, Mr. Carr.

(Same objections.)

Ans. I did not see Ackerson. I made the inquiry through McCarver. I did not see Ackerson then.

C. E., 317 Ques. I ask you to answer my question.

(Same objections.)

531 Ans. Not in person.

C. E., 318 Ques. Did you call on him by or through anybody else to do so?

(Same objections.)

Ans. Yes, sir.

C. E., 319 Ques. By or through whom?

(Same objections.)

(And for the further ground that the witness has answered by relating the facts and circumstances which took place at the time.)

Ans. McCarver.

C. E., 320 Ques. What message did McCarver bring you back from Ackerson?

(Same objections—with additional objections as to preceding question.)

Ans. That they would fix it at another time.

C. E., 321 Ques. Was Gen. McCarver the only person who bore those messages back and forth from your house to Ackerson's store?

(Same objections.)

Ans. He bore the most of them. Not the only person.

C. E., 322 —. Who were the other bearers?

(Same objections.)

Ans. John W. Ackerson, William E. Ackerson. A millman, I cannot recall his name, was very active at that time.

C. E., 323 Ques. The two Ackersons and Gen. McCarver and the millman were the parties through whom the negotiations were carried on?

(Same objections.)

Ans. Principally.

C. E., 324 Ques. Who were present in your house when Gen. Mc-

Carver brought back from John W. Ackerson that message which you have related?

532 (Same objections.)

Ans. I do not recall any one but my wife. She might have been in another part of the house.

C. E., 325 Ques. Which was it, before or after Gen. McCarver told you "that they would fix it at another time," that John W. Ackerson, Lewis M. Starr, Edward S. Smith, George O. Kelly, George E. Atkinson, "Railroad" Shannon, Wm. Ackerson, your father, and the one or two Portland men, were at your house?

Ans. McCarver brought me this message after these men had been at my house, is my recollection.

C. E., 326 Ques. Were not some of these men present on the receipt of any of the messages from Ackerson's store, where the negotiations were carried on with Captain Ainsworth?

(Same objections.)

Ans. I think not.

C. E., 327 Ques. Cannot you recollect the order of time, or the time of day at which those parties called at your house on that day—the 3d of July?

Ans. Most of them called in the forenoon.

C. E., 328 Ques. What was the largest number of them present at one time?

Ans. Three, I think.

C. E., 329 Ques. Who were those three?

Ans. McCarver, John W. Ackerson—I think it was at that time—and my father. That is my present recollection.

C. E., 330 Ques. How do you come to recollect that those three were together at the house, and are unable to fix the order of time in which the others were there?

Ans. They mostly came singly.

C. E., 331 Ques. I ask an answer.

Ans. By conversations that took place between my father and me.

533 C. E., 332 Ques. When did those conversations take place?

Ans. Just after I had fixed the dinner.

C. E., 333 Ques. What was so peculiar in those conversations that you recollect the presence of McCarver and Ackerson while they were carried on?

Ans. Of a strictly private nature calculated to fix itself in my mind.

C. E., 334 Ques. Were McCarver and Ackerson hearers of those strictly private conversations between you and your father?

Ans. Partially.

TUESDAY, *June* 19, 1883—10 a. m.

Present, as of yesterday.

C. E., 335 Ques. McCarver and Ackerson are both dead, are they not, Mr. Carr?

Ans. Yes, sir.

C. E., 336 Ques. You have a decided preference for dead men over living men as witnesses to be invoked in your favor, have you not?

Ans. No, sir.

C. E., 337 Ques. How is it then, if you have not, that you always do invoke the dead men, rather than the living?

Ans. I do not.

C. E., 338 Ques. Were McCarver and Ackerson and your father, and your then wife, the only persons present when you executed the paper you have referred to as the bond or deed to Ainsworth, conveying the 40 acres of land you have described?

Ans. No such occurrence ever took place.

C. E., 339 Ques. What do you mean by no such an occurrence?

Ans. The execution of any deed or bond to Ainsworth.

C. E., 340 Ques. Have you forgotten already that you tes-
534 tified yesterday that you did execute on the 3d day of July, 1873, a bond or deed to Ainsworth for 40 acres of land which you have particularly described, and that you did not deliver it because he did not offer to you his bond as agreed?

Ans. You misapprehend my answer. I said the deed or bond to Ainsworth was not executed—the one that was executed is the one here offered.

C. E., 341 Ques. In whose presence was the one here offered executed?

Ans. George E. Atkinson was one of the witnesses, and I forgot who the other one was.

C. E., 342 Ques. Was your wife sitting up when she signed that deed?

Ans. I do not remember; I presume she was.

C. E., 343 Ques. When was the child born with which she was seven and one-half months advanced in pregnancy at that time?

Ans. Some time in August; I forget the date now.

C. E., 344 Ques. Does that child still live?

Ans. No, sir.

C. E., 345 —. When did it die?

Ans. I do not remember the date now; I can tell by papers that I have.

C. E., 346 Ques. Give about your nearest recollection.

Ans. It was some time in 1875—I cannot remember.

C. E., 347 Ques. Which was it—a boy or a girl?

Ans. It was a girl.

C. E., 348 Ques. What was her name?

Ans. Ethel.

C. E., 349 Ques. Cannot you recollect in what season of 1875 it was?

Ans. It was after my wife left me, and I do not want to talk
535 about that subject now. I will go out of the house in about a minute.

C. E., 350 Ques. When did you say your wife left you?

Ans. In January, 1875.

C. E., 351 Ques. That girl was not the only child you had by your then wife, Josephine?

Ans. No, sir.

C. E., 352 Ques. Was any child born to you by your wife Josephine after the birth of that girl child?

Ans. No, sir.

C. E., 353 Ques. When your wife left you, did she leave that girl child with you?

Ans. No, sir.

C. E., 354 Ques. Does it not strike you as strange, Mr. Carr, that while you remember with wonderful distinctness everything done in relation to you or your affairs by men now dead, you cannot without reflection recall within a year the time of your wife's separation from you, and cannot recall even the season in 1875 when your child died?

(Plaintiff's attorney objects to question on ground that it is improper and not proper cross-examination, and unfair in this: that counsel is constantly assuming facts which are not shown by the evidence to exist; and particularly in this question assumes that witness recollects facts of which there are no living witnesses, when witness has constantly given names of witnesses both dead and living.)

Ans. I ask to be released from this persecution. I will answer all fair questions. It is none of his business what my private affairs are.

C. E., 355 Ques. Mr. Carr, was the bond or deed to Ainsworth, which you have referred to, signed by you and your wife?

Ans. No, sir.

536 C. E., 356 Ques. Now, Mr. Carr, was not that paper which you refer to as the bond or deed to Ainsworth in reality a conveyance to the Northern Pacific Railroad Company, through Robert R. Thompson, its trustee, of the S. W. ¼ of the N. W. ¼ of sec. 32, T. 21 N., R. 3 E., containing 40 acres?

(Objected to by plaintiff's attorney as immaterial and irrelevant.)

Ans. No, sir; it was not for that piece of land. It was not to Thompson.

C. E., 357 Ques. Did you not on the 3d day of July, 1873, convey to the Northern Pacific Railroad Company, through Robert R. Thompson, its trustee, the tract of land just described, and now in controversy?

(Objected to by plaintiff's attorney, as it is asking witness to state a conclusion of law; that witness can only be asked to state facts,

what he did do, and not proper cross-examination; and is immaterial and irrelevant.)

Ans. No, sir; I never made any papers to the land in controversy to R. R. Thompson at any time. The first bond was made to L. M. Starr.

C. E., 358 Ques. Did you on that day make such conveyance direct to the Northern Pacific Railroad Company?

(Same objections as above—and further, the pleadings lay no foundation whatever for introducing such evidence, or claiming title through any such instrument.)

Ans. No, sir; I never made the railroad any title at that time.

C. E., 359 Ques. Did you not on that day, in the presence of your father, George E. Atkinson and William P. Byrd, sign, and did not your wife also sign, a deed conveying the tract of land now in controversy to the Northern Pacific Railroad Company, either directly, or through its trustee, Robert R. Thompson?

(Same objections as above.)

Ans. No, sir; I did not.

537 C. E., 360 Ques. Did you not on that day, in the presence of the persons just named in last preceding question, sign the deed referred to by me; and after your wife had signed it also, did you not snatch it violently from the hands of George E. Atkinson, then a justice of the peace, before whom you and your wife had acknowledged its execution, leaving but a small part of it in Atkinson's hands?

Ans. No, sir—no such document as you refer to.

C. E., 361 Ques. What document did you snatch from Mr. Atkinson's hands on that day?

(Same objections as above.)

Ans. The one here offered marked Exhibit M. That is the paper we had the dispute about.

C. E., 362 Ques. Then it was you, Mr. Carr, who tore off that deed, marked Exhibit M in this examination, the portion containing the names of the witnesses to its execution, and part of the names of yourself and your wife?

(Same objections by plaintiff's attorney.)

Ans. It was torn in the struggle between Mr. Atkinson and me, for its possession.

C. E., 363 Ques. Why did you snatch it from Atkinson after you had signed it, and your wife had signed it?

(Same objections.)

Ans. It was my paper, not his.

C. E., 364 Ques. What was Atkinson about to do with it when you snatched it from him?

(Same objections.)

Ans. Put it in his pocket.

C. E., 365 Ques. He had already folded it for that purpose; had he not?

(Same objections.)

Ans. Yes, sir; or was just finishing folding it.

538 C. E., 366 Ques. Did not Atkinson demand back from you, after you snatched this deed from him, the paper purporting to be a quitclaim deed from Starr to you?

(Objected to as immaterial and irrelevant, and not cross-examination. Further, it is leading.)

Ans. No, sir; he did not.

C. E., 367 Ques. Did you not, at the same time that you snatched from Atkinson the deed marked Exhibit M, also pick off the table, where your father had laid it, the quitclaim deed referred to, and refuse to give it back to either Atkinson, your father, or W. P. Byrd?

(Same objections.)

Ans. No, sir; I had locked the deed up; it was not on the table; I was too glad to get it; no one asked me for it—that is, the deed from Starr to me I refer to.

C. E., 368 Ques. Upon what condition, understanding or agreement, expressed or taken for granted from the nature of the preliminary consultations, did you get possession of the paper referred to as the quitclaim deed from Starr?

(Same objections.)

Ans. I made no agreement, conditions or understanding. I demanded that Starr should fulfill his part of the contract, as expressed in the bond, and retransfer to me the land in question, which he did.

C. E., 369 —. Was it not the condition and agreement perfectly understood between you and your wife and your father and George E. Atkinson and William P. Byrd, that the paper referred to as the quitclaim deed should be given to you, for the purpose of enabling you to, and upon the condition that you would then immediately convey to the Northern Pacific Railroad Company the tract of land in question?

539 Ans. No, sir; I made no agreement. I was opposed to subsidy, as every one then and there knew.

C. E., 370 Ques. Did you not know that your agreement to execute such a conveyance to the Northern Pacific Railroad Company was the sole and only consideration for giving you back that quitclaim deed?

Ans. No, sir.

C. E., 371 —. What understanding had you of the ground upon which you were enabled to get possession of it?

Ans. I totally refused to talk subsidy at all until the contract had

been carried out. They had to make me the release to get me to talk subsidy at all.

C. E., 372 Ques. Then, when you got the release, you tried to cheat them by snatching back from the hands of Mr. Atkinson and keeping in your possession the conveyance made to the Northern Pacific Railroad Company as a condition of your getting the release?

(Plaintiff's attorney objected to the question on the grounds that when viewed by previous answers of the witness the question is wholly unintelligible, and still assumes that the witness made some contract or agreement with the party by which he got the quitclaim deed.)

Ans. No, sir; I did not try to cheat them. The cheating was the other way, and I made no contract or agreement to get Starr's deed.

C. E., 373 Ques. You say, Mr. Carr, that you would not talk subsidy to them until you got the release from Starr. Now, when you got the release, were you in a favorable mood to talk subsidy?

Ans. As I said before, I was opposed to subsidy on general principles, but was willing to talk on the subject and hear what they had to offer in favor of subsidy.

C. E., 374 Ques. Mr. Carr, does the land described in the
540 deed marked Exhibit M form a part of the tract referred to by you as your homestead claim?

Ans. No, sir.

C. E., 375 Ques. Of what tract or claim does it form a part?

Ans. Part of the Gibson claim.

C. E., 376 Ques. What title did you have on the 3d of July, 1873, to the land described in Exhibit M?

Ans. Deed of purchase from Gibson.

C. E., 377 Ques. Do you recollect about the date of that deed from Gibson to you?

Ans. No, sir; not now.

JUNE 21ST, 1883—10 a. m.

C. E., 378 Ques. Do you recognize the handwriting in which the tract of land conveyed in the deed marked Exhibit M is described, and in which your name and your wife's name at the beginning are written?

Ans. Yes, sir.

C. E., 379 Ques. Whose handwriting is it?

Ans. To the best of my knowledge it is my father's.

C. E., 380 Ques. When did he write that portion of the deed?

Ans. The day it is dated, the 3d of July, 1873.

C. E., 381 Ques. When did he write it, before or after you snatched the deed out of Mr. Atkinson's hands?

Ans. He wrote it before.

Plaintiff's redirect:

R. D. 1. After the 3d day of July, 1873, if you remember, what was the first thing you did on the premises in question?

(Defendant objects because immaterial and irrelevant. Plaintiff already went into that in chief.)

Ans. Upon that piece of land, do I understand? On the 4th day of July, 1873, I went by way of Steilacoom to Olympia. I
541 had an axe and saw on that land. I went and got those before I went to Steilacoom.

R. D. 2. You spoke of building a slaughter-house upon the premises. When was that done?

(Defendant's attorney objects as before—for same reasons.)

Ans. I cannot recall the exact date. It was in the spring of 1873, I believe—that is as near as I can remember now.

R. D. 3. In reference to the 3d of July, 1873, was it before or after that date?

(Same objections as before—besides it is leading witness.)

Ans. I cannot recall; not a great while before or long after.

R. D. 4. What was the size and dimensions of the house, as near as you can remember?

(Same objections by defendant's attorney.)

Ans. Well, it is about 20 or 30 as I remember.

R. D. 5. What kind of lumber?

(Same objections by defendant's attorney.)

Ans. The house is built of logs.

R. D. 6. Cut from the premises?

(Same objections—also leading.)

Ans. Yes, sir; near where the house is.

R. D. 7. Did you construct the building yourself or have hired help?

(Same objections as before by defendant's attorney.)

Ans. I worked on it myself, and hired some of the work done.

R. D. 8. At that particular time, Mr. Carr, where did the railroad commissioners, directors or agents, generally meet to transact their business in regard to the railroad company?

(Defendant's attorney objects because immaterial and incompetent.)

Ans. In the building where Hanson, Ackerson & Co.'s store was—Hanson now—at Tacoma.

542 R. D. 9. How far is this land in controversy from that place?

(Same objections.)

Ans. I think it is just across a forty acres—eighty rods or near that.

R. D. 10. Who is this Ackerson, in Hanson, Ackerson & Co.?

Ans. John W. Ackerson, one of the then firm of Hanson, Ackerson & Co.

R. D. 11. Was he at that time connected with the railroad company in any way?

(Objected to by defendant's attorney as immaterial and incompetent.)

Ans. Not that I am aware of.

R. D. 12. At the time you built this slaughter-house did any person make any objection, either directly or indirectly?

(Objection by defendant's attorney as immaterial and leading.)

Ans. No, sir; none at all.

R. D. 13. Can you remember when that house was built in relation to the time you and your wife made the trust deed to L. M. Starr?

(Objection by defendant's attorney. Same as above.)

Ans. My recollection is that the house was built after the deed was made.

R. D. 14. Is the house still standing on the premises?

(Objections as above.)

Ans. Yes, sir.

R. D. 15. What use, if any, have you made of it since July, 1873?

(Defendant's attorney objects—immaterial and also irrelevant.)

Ans. It has been rented most of the time.

R. D. 16. By yourself?

(Objected to—immaterial and irrelevant.)

Ans. Yes, sir; I have always had control of it.

543 R. D. 17. Has this control of it ever been resisted by any person in any shape, manner or form?

(Objected to as above.)

Ans. No, sir.

R. D. 18. What other acts have you done upon the premises since the 3d of July, 1873?

(Objected to as above.)

Ans. I have made shingles with my own hands, and hired shingles made; and I have cut, hauled, used and sold bark and cord-wood, and I have cut and sold quite a large amount of cedar bolts.

R. D. 19. You still have and exercise the same control over the premises as you have heretofore?

(Objected as before.)

Ans. Yes, sir.

R. D. 20. In all these acts done and performed by you upon the premises, or in any of them, have you ever been resisted, or your right disputed, either directly or indirectly, by any person whomsoever?

(Objected to as before by defendant's attorney.)

Ans. No, sir; no one ever interfered with me.

R. D. 21. Then, Mr. Carr, state as well as you can what you meant when you said that your claim to the possession had been disputed "only in a weak, nominal kind of way"?

(Objected to as before by defendant's attorney; and further, witness has particularly explained already his meaning.)

Ans. Well, that there was more or less talk that the company laid claim to my land, and this tended to vitiate my title. No act opposing my possession was done. I cannot put it in very good shape.

R. D. 22. When did you acquire the title to this land? Before or after your marriage?

(Objected to on the same grounds.)

Ans. Before.

544 R. D. 23. What did you say your age was, Mr. Carr?

Ans. Forty-two this month.

R. D. 24. In cross-examination question 51, you have been asked as to your intelligence, brightness, etc. What has been your means of acquiring an education?

Ans. At the common schools only.

R. D. 25. How much time did you attend the common schools, to the best of your recollection?

Ans. Perhaps one year; not much more. That is altogether, not at one term.

R. D. 26. You mean by that, that one year's time will cover all your schooling; all the time you went to school?

Ans. Very nearly, if not quite.

R. D. 27. Is that all the mode of instruction you ever had of acquiring an education?

Ans. Yes, sir; with what books and papers I read.

R. D. 28. During the civil war where were you?

(Defendant's attorney objected—immaterial.)

Ans. I was a soldier.

R. D. 29. For how long?

Ans. About three and a half years I believe it was. I enlisted for three years; then a year.

R. D. 30. What was your age when you went into the army?

(Same objections.)

Ans. Nineteen.

R. D. 31. What rank did you hold?

Ans. I enlisted as a private. I was afterwards promoted to corporal and sergeant.

R. D. 32. Was you in the army at the close of the war?

Ans. Yes, sir; my last term was out 16th October, 1865.

R. D. 33. Where did you go after the war?

(Same objections.)

545 Ans. Back home to Indiana; then shortly afterwards started for this coast.

R. D. 34. Have you remained here ever since?

(Same objections.)

Ans. Yes, sir.

R. D. 35. When you left school what studies were you in, or how far had you advanced?

(Same objections.)

Ans. I was practicing reading, writing, and spelling, and common arithmetic, geography, stenography—that is, short-hand writing. There might have been something else—I do not remember.

R. D. 36. Did you ever at any time study the dead languages any?

Ans. Not to make it a study. I read something about Latin and Greek derivations.

R. D. 37. Mr. Carr, you have been cross-examined a great deal about the phrase, "the Tacoma Land Company and its tools." In your opinion at the time you made use of that phrase, what acts of a person would constitute him a "tool"?

(Defendant's attorney objected—immaterial and irrelevant. Witness has explained at length what he meant, and stated the acts which justified him in the use of that expression; matter of opinion inquired for rather than fact.)

Ans. Well, I presume any one understands what a willing or ready acquiescence to the wishes or desires of others means. I meant a person who was ready to do what was asked or required of them, without question; just as I did when, under a musket, I was a "tool" of the Government. I done what I was ordered to do without question. I meant no spite or odium when I used the remark.

R. D. 38. When you said that you could name forty such persons, did you have in your mind at the time forty persons—the
546 names of forty persons—or was it a matter of opinion with you that forty such persons could be found and named?

(Defendant's attorney objects—that it is leading, incompetent, irrelevant—and the witness has already at length explained what he meant by the expression used.)

Ans. I then thought, and still do, that more than forty persons

talked adversely to my title, and I presumed if given time, I could think of and write or name forty of those persons.

R. D. 39. When did you first become aware, or learn that an attempt would be made to show that a notice had been served upon you on the 30th day of June, 1873; that is, I mean the notice referred to in your cross-examination and examination-in-chief?

(Defendant's objection—immaterial, irrelevant—not redirect examination. And also assumes what does not appear in the testimony—that "an attempt would be made to show such service of notice.")

Ans. The first time I have ever heard of this notice of location was some time last fall or summer—somewhere from eight to twelve months ago; I don't just remember now.

R. D. 40. I mean by my question the notice which was mentioned in the first deed of yourself and wife to Starr?

(Defendant objected as leading and as before.)

Ans. Yes, sir; that is the one I refer to.

R. D. 41. When you heard that, what effect, if any, did it have upon you as regards what took place upon that day?

(Defendant's attorney objects—immaterial, leading, irrelevant, incompetent, and not redirect examination.)

Ans. Well, it caused me to remember distinctly that I never received any notice of that kind; that I never heard of any such *no*-notice at that time. It was altogether new to me.

R. D. 42. Just immediately prior to the 30th of June, 1873, what conversations, if any, did you have with the agents, directors
547 or officers of the Northern Pacific railroad in regard to the premises in controversy, or any subsidy you might make to them?

(Same objections as to preceding question.)

Ans. I cannot recall now that I talked with any officers of the Northern Pacific Railroad Company—different people at various times, with the same object, to induce me to subsidize.

R. D. 43. I will ask you, Mr. Carr, if anything was said to you immediately prior to the 30th of June in regard to extending the time for the company to fulfill those conditions?

(Objected to as before.)

Ans. Yes, sir.

R. D. 44. Go on now and state what was done in reference to *to* that matter; when, and by whom. Tell your own history of it.

(Objected to as before.)

Ans. As much as two weeks, I think, before the first day of July, 1873, or 30th of June, 1873, Starr and Smith and Ackerson, and Atkinson and McCarver and others asked or requested of me that I give a bond until a further period of time, that is past the 30th of

June, for the land in question to the company, with similar conditions already given, but giving greater time.

JUNE 21ST, 1883—2 p. m.

R. D. 45. About the 3d of July, 1873, what was the state of feeling existing between you and L. M. Starr?

(Defendant's attorney made same objections as to previous questions.)

Ans. I do not think they were particularly amicable.

R. D. 46. Well, then, were they particularly not so?

(Same objections.)

Ans. He was a rich man; I was a poor man. He seemed to hold me in contempt for the difference of position between us. I did not have any particular spite against him; neither had I much regard for him.

548 R. D. 47. How much more time did these parties want within which to locate the terminus?

(Same objections.)

Ans. They first asked until the first of August; finally until the 15th of July. The last was the least that they would be satisfied with.

R. D. 48. Did Starr himself make such a proposition to you?

(Same objections.)

Ans. Yes, sir.

R. D. 49. Anybody else in behalf of the railroad?

(Defendant's attorney objects as before.)

Ans. Yes, sir. Smith, Ackerson, and McCarver, that I remember now, made the same request repeatedly.

R. D. 50. About how long before the 30th of June, 1873, did Mr. E. S. Smith make that request to you?

(Same objections.)

Ans. Near as I can recollect, it was a week to ten days previous to the 30th of June.

R. D. 51. At the time you and your wife signed that deed or bond, marked Exhibit M (you stated, I believe, that it was in your father's handwriting), was that written at your dictation at the date it purports to have been executed?

(Same objections.)

Ans. Yes, sir.

R. D. 52. Immediately after it was written or filled out, what was done with it?

(Same objections.)

Ans. McCarver or my father, I am not sure which, took it to show

the parties over at the mill store, and one of them, or Atkinson, brought it back to me signed.

R. D. 53. What did they say to you when they brought it back, that you remember?

549 (Same objections.)

Ans. I was told that Ainsworth would give me his bond as I required, and this torn bond was signed and executed.

R. D. 54. After it was signed by you and your wife and acknowledged, what then took place in regard to it?

(Same objections.)

Ans. Atkinson was about folding it up, to put it in his pocket. I told him to let me have it—I considered it my property. He said, "No; I'll take charge of this;" and made a move to go off with it. In the struggle for its possession it was torn. Atkinson took the bond and went out with it, and met my father, and gave the torn bond to my father, and told him to get me sign another. My father gave it to me, and I have kept it since.

(Plaintiff's attorney here offers in evidence Exhibit M, referred to in defendant's cross-question 282, and then produced at instance of defendant's attorney.)

(Defendant's attorney objects—as incompetent and irrelevant in redirect examination.)

R. D. 55. I will call your attention to cross-question 57.

Referee, requested, reads question as follows:

"Cross-question 57. I will ask you, Mr. Carr, and I specially urge that you be candid just for once in your answer, even though you intend never to be so again, whether it is not your consciousness that you have entangled yourself in a network of falsehood, rather than the want of quick intellectual perception, which makes you so evasive and unwilling a witness?" To which you answered "yes" and "no."

Now explain what you meant by that answer?

Ans. I meant that I was not an unwilling witness; that I had not purposely misstated anything; that I was willing to answer all questions pertinent to the case. I think that covers the answer. If it does not, I will put more to it till it does.

550 R. D. 56. Referee is requested by plaintiff's attorney to read again cross-question 57, which is done.

Now explain what you meant by that answer in reference to that particular question. In other words, what did you mean by the answer "Yes;" and what did you mean by the answer "No"?

Ans. "Yes," that I was ready to answer questions; and "No," that I was not conscious that I had stated any falsehoods.

R. D. 57. I believe you mentioned, Mr. Carr, several names of persons who came to you, immediately prior to the 30th of June, 1873, to get an extension of time for the Northern Pacific railroad to locate the terminus. Do all those parties whom you named now lie beneath tombstones?

Ans. No, sir.

JUNE 22, 1883—10 a. m.

R. D. 58. Have you ever been a witness before a court prior to this time?

(Defendant objects as before.)

Ans. Only once.

R. D. 59. When and what court was that?

(Defendant objects as before.)

Ans. It was at Steilacoom. It was some years ago; but I cannot fix the date. I was on the stand some twenty minutes.

R. D. 60. Did you have any interest in the subject-matter of the litigation?

(Defendant objects as before.)

Ans. Yes, sir; some interest.

R. D. 61. Is that the only time you were ever called as a witness in any case until this time?

(Defendant's attorney objects for reasons same as to previous questions.)

551 Ans. I was called once before to identify a man whether I knew him or not.

Recross-examination by JOHN ARTHUR, Esq., of counsel for defendant:

X X 1. Mr. Carr, on what part of the tract of land which is here in controversy, does the slaughter-house referred to by you stand?

Ans. On the east side of tract, near the centre north and south.

X X 2. How near the dividing line between the tract and your other land in the same claim does the slaughter-house stand?

Ans. The county surveyor run the line for me once, and brought the line within three or four feet of the slaughter-house.

X X 3. Are you sure that the slaughter-house lies within the tract of land in controversy?

Ans. I was chain-carrier for the county surveyor at the time, and that was where he ran the line.

X X 4. I ask you to state whether you are sure that the slaughter-house lies within the tract of land in controversy.

Ans. To the best of my knowledge I am sure.

X X 5. When did the county surveyor run this line for you, to which you have referred?

Ans. Shortly after the building was put up.

X X 6. How shortly after?

Ans. Near as I can recollect it was—well, two or three months afterwards. I cannot recollect the exact time now.

X X 7. What year was it in?

Ans. Well, I have not been able to fix in my mind definitely when the house was built and the surveying done—whether in 1872 or 1873.

X X 8. Are the premises in controversy here fenced in, Mr. Carr?

Ans. No, sir.

552 X X 9. Is there anything, except what marks or signs that county surveyor made for you, to indicate the separating line between the disputed premises and your other premises in the same claim?

Ans. No, sir.

X X 10. Is it not customary on the town site of either Old or New Tacoma, with those who want wood for fuel or make-up, to cut it wherever they find it most convenient?

Ans. It might be customary with some people—it is not a universal custom, I think.

X X 11. Have you exercised, Mr. Carr, or done in relation to the premises here in controversy, any other acts of ownership than those related by you in this examination, in answer to your counsel's questions?

Ans. I do not know that I fully comprehend the question. I have done and acted with this land as I would with any of the rest of my land.

X X 12. Can you recollect any acts of ownership in this tract in controversy done by you except or beside those related in answer to your attorney's questions?

(Plaintiff's attorney objects upon the grounds that the question assumes that acts of possession are not also acts of ownership.)

Ans. That is a question I do not comprehend.

(Plaintiff's attorney withdraws his objection and referee repeats the question X X 12.)

Ans. I probably done other things; I exercised my full right on the land; I want to answer the questions.

X X 13. What other things; if you can, recall them?

Ans. Well, I should have to refer to the answer given, and then I might enumerate some things.

Answer read by referee.

Ans. I can recollect that I sold saw-logs, collected the stumpage, as it is called. I recollect now that men burnt a charcoal

553 pit there and paid me for that.

X X 14. Anything else, Mr. Carr?

Ans. I sold part of it, if that is anything to do with it.

X X 15. You have some doubt in your mind, I judge, whether there should be necessarily any connection between your selling of land and your ownership of it?

Ans. No, sir; I would not sell land that I did not think belonged to me.

X X 16. How much of the tract in controversy did you sell or attempt to sell?

Ans. I have sold four acres—would sell it all if I could get my price.

(Plaintiff objected to above because immaterial and irrelevant, and not proper cross examination.)

X X 17. When and to whom did you sell those four acres or attempt to sell them?

Ans. I sold two acres to J. E. or J. A. Lewis, one acre to Caldwell—I forget his first name—and one acre to R. V. Staley. The acres to Lewis a number of years ago; I don't remember the date. To Caldwell and Staley, from eight to twelve months ago.

X X 18. Were the two latter sales, or attempted sales, made before you commenced this suit?

Ans. Yes, sir.

X X 19. Can you not recall the exact time?

Ans. No, sir; not now; I cannot.

X X 20. When did you commence this suit?

Ans. I do not remember the exact date.

X X 21. Did you inform those parties whom you have named, that the land sold to them lay within the tract of land which you have bonded or donated to the Northern Pacific Railroad Company, and which is claimed by the Tacoma Land Company?

Ans. I don't remember; I might or I might not.

X X 22. Did any of them mention to you in the course of
554 the preliminaries that they were aware of this claim of the Tacoma Land Company as successor in interest of the Northern Pacific Railroad Company?

Ans. I do not recollect whether the subject was mentioned or not.

X X 23. Did you not feel under any moral obligation, according to the common rules of honesty, to advise those parties of the situation of the land, and the claim upon it of the Tacoma Land Company?

Ans. I looked upon the land as my own, and never admitted or thought that the land company had any claim on it whatever after Starr's deed to me.

X X 24. Answer the question.

Ans. No, sir; I did not feel under such obligation.

X X 25. What were the earliest of those sales, or attempted sales, Mr. Carr?

Ans. Well, I cannot fix the date of sale to Lewis; it was early in 1875.

X X 26. Was that the earliest?

Ans. Yes, that was the first sale.

X X 27. Is the Lewis you refer to a man?

Ans. No, sir—a widow woman.

X X 28. Is that her name now?

Ans. No, sir; her name is now Stone.

X X 29. You do not think it a great sin, do you, to defraud a widow?

Ans. I do.

X X 30. How great a sin?

Ans. Very great—greater than I would do.

X X 31. I suppose, then, you regard yourself as a very great sinner in this transaction with Mrs. Lewis?

Ans. Not in the least.

X X 32. Was your wife Josephine living with you when
555 this transaction with Mrs. Lewis took place?

Ans. No, sir.

X X 33. Where was she when it took place?

Ans. In California.

X X 34. She did not join in the attempted conveyance, did she?

Ans. No, sir.

X X 35. Do you recollect who were the witnesses to this transaction with Mrs. Lewis?

Ans. No, sir; I do not.

X X 36. Try to recollect, Mr. Carr.

Ans. I have, but I cannot fix it in my mind now.

X X 37. Can you recollect before whom the acknowledgment was made?

Ans. Not surely.

X X 38. Before whom do you think it was made?

Ans. I had an idea that it might be Judge Botsford here, but I am not sure.

X X 39. What other figure rises before your mental vision?

Ans. A broken wagon.

X X 40. You think, then, that it lies between Judge Botsford and a broken wagon?

Ans. No, sir.

X X 41. What other figures loom up?

Ans. I do not know what the counsel refers to.

X X 42. May not the acknowledgment have been taken before George E. Atkinson?

Ans. It might have been.

X X 43. Are you not sure about that?

Ans. No, sir; I am not.

X X 44. Cannot your mental eye, looking back to that time, descry any family ghost in the distant horizon?

Ans. Yes, sir; I have a supply of family spectres in my mind.

X X 45. What connection, if any, have those spectres with
556 this transaction with Mrs. Lewis?

Ans. None at all.

X X 46. How soon after this transaction with Mrs. Lewis did the other transactions take place?

Ans. Some six or seven years—I do not remember exactly.

X X 47. What price did Mrs. Lewis pay for the two acres sold to her?

(Objected to as immaterial and irrelevant.)

Ans. I took a wagon and gun in pay.

X X 48. Was the gun hers?

Ans. I presume so.

X X 49. Was that all the consideration that passed from her to you for the two acres?

Ans. Yes, sir.

X X 50. What was the wagon worth?

Ans. About fifty dollars.

X X 51. What was the gun worth?

Ans. About fifteen dollars.

X X 52. What price did the other parties pay you?

(Same objection by plaintiff's attorney.)

Ans. Caldwell was to have paid me six hundred dollars and Staley was to pay me five hundred dollars.

X X 53. What did they pay you?

Ans. Caldwell paid me one hundred and twenty-five dollars in money and his note for the balance. Staley paid me four hundred in money.

X X 54. How long has Caldwell's note to run?

(Same objection by plaintiff's attorney.)

Ans. I think it was four months.

X X 55. When did he make the note to you?

Ans. I do not remember the date.

X X 56. Can you not approximately remember it?

Ans. Well, it has been a year ago—possibly a little more; I cannot more nearly fix the date in my mind.

557 X X 57. Has the note been paid yet?

Ans. No, sir.

X X 58. Why not?

(Plaintiff's attorney objected as above.)

Ans. Caldwell left the mill where he worked—told me he had not the money.

X X 59. What provision did Staley make as to paying you the balance due by him?

(Same objections.)

Ans. None; just his verbal agreement.

X X 60. When did he agree to pay it?

Ans. Soon as possible; in a few weeks or months, as the case might be.

X X 61. You said yesterday, Mr. Carr, that the claim of the Tacoma Land Company to the tract in controversy tended to vitiate your title. Did you inform Caldwell and Staley, or either of them, of this circumstance before entering into any agreement with them?

Ans. Yes, sir; I did.

X X 62. Why have you, Mr. Carr, up to this time in this examination concealed all information concerning these transactions with Mrs. Lewis and with Caldwell and Staley?

Ans. I have concealed nothing; I mentioned it as soon as asked about it.

X X 63. Did you advise your attorneys, upon commencing this suit, of those transactions?

Ans. I do not know that we had any special conversation on that subject. They might have known of it—I cannot say.

X X 64. Did you swear to the complaint in this action brought by you against the Tacoma Land Company?

Ans. I don't remember—I probably did.

X X 65. Why did you swear to a complaint which set forth that you were then the owner of the forty acres in controversy?

(Objected to by plaintiff's attorney upon the ground that such is admitted by the defendant's pleadings.)

558 Ans. To quiet title.

X X 66. Do you consider that perjury committed for the purpose of quieting title is not a sin or crime?

Ans. No, sir.

X X 67. Do you mean that perjury is not such?

Ans. I consider perjury a great crime.

X X 68. Answer the question whether you consider that perjury committed for the purpose of quieting title is or is not a sin or crime?

Ans. I consider perjury a crime under any circumstances—I do consider it a crime.

X X 69. What view do you take of the sinfulness of it, Mr. Carr?

Ans. I do not recognize any great difference between sinfulness and crime.

X X 70. Did not your commission of perjury in the complaint in this action in order to quiet title tend in any way to disquiet your conscience?

(Objected to by plaintiff's attorney—that the question assumes that perjury has been committed by the witness.)

Ans. The attorney has charged me point blank with committing perjury. He must prove it or retract it. Then I will answer his question.

X X 71. Will you answer the question now, Mr. Carr?

Ans. What question?

X X 72. The last preceding question 70?

(Question read by referee.)

Ans. My conscience has not been troubled in this case.

X X 73. Was it of your own volition, or was it under legal advice, that you concealed up to the present, in this action, and in this examination, everything concerning the transactions with Mrs. Lewis, and Messrs. Caldwell and Staley?

(Plaintiff's attorney objected—immaterial and irrelevant.)

559 Ans. Neither one; I have concealed nothing; the sales are matters of record. I presume the deed to Lewis is recorded.

X X 74. Have you given deeds to the other parties?

Ans. Neither one is fully paid for. One deed is made; the other is not.

X X 75. Have you given deeds?

Ans. The plural deeds—I have not.

X X 76. Which deed is made?

Ans. Staley's.

X X 77. Is that deed delivered?

Ans. No, sir; I have it, or can get it.

X X 78. Now, Mr. Carr, you have said that only one of the deeds is delivered and recorded. Was it of your own volition or under legal advice that you have, up to this morning, in this action said nothing, either by yourself or by your attorneys, about either the recorded deed or the other two sales or attempted sales?

Ans. Neither one—the subject was not mentioned was the only reason I did not speak of it.

X X 79. Why did you not mention these attempted sales, either to your attorneys or in the complaint in this action, or while under examination by your counsel?

Ans. Well, I probably thought it did not cut any figure in this case. If I sold any land I certainly intended the title to be good.

JUNE 23—9 a. m.

X X 80. Mr. Carr, I desire to moderate and qualify my use of the term perjury in one of the preceding questions (X X 70), and to say that I do not like its harsh sound, but used it as the readiest term to bring forcibly to your attention the conflict between your sworn allegations in your complaint in this action and the testimony which you had just given in regard to the attempted sales of portions
560 of the land in controversy to Mrs. Lewis and to Caldwell and Staley. I will now call your attention, Mr. Carr, to your sworn complaint of April 2, 1882, and your sworn complaint of April 27, 1882, in both of which you allege in substance: That you were then and for a long time theretofore had been in the possession of and the owner in fee simple of the legal subdivision of land here in controversy. It now appears from your testimony in this cross-examination that before the commencement of this action you had sold, as far as you could have sold, four acres of land in this subdivision, and had received nearly all of the purchase-money for it. How would you undertake to reconcile this conflict?

(Plaintiff's attorney objects to the question, on the ground that there is no testimony clear and positive that he disposed of more than two acres of the land prior to the commencement of this suit. The witness, it is true, has stated that the other portions than the two acres just mentioned were disposed of by him prior to the commencement of this suit; but in the same answer he also states that it was about eight months ago, which is subsequent to the time of commencement of this suit.)

Ans. This is the only complaint I ever brought in court. I intended the complaint to read forty acres, more or less, or to cover just the ground necessary—no more nor less.

X X 81. Why, Mr. Carr, in the light of the transactions which you have just related, did you not make the complaint read 36 acres more or less?

Ans. As long ago as April, 1882, I had sold but two acres. I think the two last referred to partial sales only; have been sold since then. I did not write the complaint myself; I supposed it was correct.

(Referee notifies witness to produce deed to Staley as best and only evidence.)

X X 82. Even in that event, why should you have laid claim to more than thirty-eight acres?

561 Ans. I did not so intend it to read.

X X 83. You say, Mr. Carr, that a deed to Caldwell has not yet been executed. Do you know anything of the present whereabouts of Caldwell?

Ans. Not exactly—I have not seen him for some weeks.

X X 84. Now, Mr. Carr, state, as nearly as you know, his whereabouts.

Ans. He has a claim somewhere up the Sound; he has a claim there. I do not know where his claim is.

X X 85. You were not sure of his full name yesterday; can you remember it now?

Ans. Yes, sir; his name is Louis Caldwell.

X X 86. Mr. Carr, as you cannot recollect the date of the deed to R. V. Staley, you will produce it to the referee for inspection.

Ans. I will as early as convenient.

X X 87. In your answer to redirect interrogatory No. 44, you said that you were requested a short time prior to June 30, 1873, to give to the Northern Pacific Railroad Company a bond or deed for the land in controversy, with the same conditions as those in the deed already given to Starr, "only giving them a greater time." By "greater time," do you mean further time in which to accept the proposals and conditions in the trust deed to Starr?

Ans. Yes, sir.

X X 88. In redirect interrogatory No. 49, you were asked whether anybody else in behalf of the Northern Pacific Railroad Company made a proposition for such an extension of time. Were any of the parties you named, that is, Starr, Smith, John W. Ackerson, Atkinson, or McCarver directors, commissioners or officers of the Northern Pacific Railroad Company?

Ans. McCarver claimed to be a commissioner of the company; and Smith claimed to be a solicitor of subsidy; said he

562 had authority to act.

X X 89. What sort of a commission did McCarver claim?

Ans. He said he held Ainsworth's commission to transact business for the company.

X X 90. Did any of those parties at any time request you to give to the Northern Pacific Railroad Company a deed for the land described in Exhibit M?

Ans. I don't know that they asked me for a deed—all of them requested me numerous times to give the land to the company.

X X 91. Do you mean the land which is described in the torn deed marked Exhibit M?

Ans. They all wanted the land in controversy, which is not the land described in the torn deed; but McCarver offered to take the land described in the torn deed.

X X 92. McCarver, then, is the only one of them who ever mentioned to you the land described in Exhibit M, in this connextion?

Ans. No, sir; that land was mentioned among some or all of the others.

X X 93. Was McCarver the only one who asked you for that land, to be deeded to the railroad company?

Ans. As I said before, all of them preferred to have the land in controversy—even McCarver did—but if I did not want to give that, he would be satisfied to take the other piece. The others did not seem to care for the land described in the torn bond.

X X 94. Which one, if any, of the other persons named, did you have any conversation with in relation to the land described in Exhibit M?

Ans. I had so many conversations, and with several different ones, that I don't recall now what particular man I talked to as particularly as with McCarver.

563 X X 95. Did you have any talk with Starr about the land described in Exhibit M?

Ans. I cannot recall now sure; I presume I did.

X X 96. Have you any distinct impression as to what it was, if you did have such talk with Starr?

Ans. There was a great deal of conversation, all with the same general purpose. I remember that Starr was very anxious that I should extend or give another bond. My recollection is that I offered to him that piece of land referred to in the torn bond; but he wanted the other tract.

X X 97. Do you recall any conversation with Smith in relation to the land described in the torn bond?

Ans. Yes, sir.

X X 98. What was it?

Ans. I remember that Smith produced and spread out a very large map, and talked a great deal about the subsidy business and the two pieces of land; that recalls to my mind why I offered to him that piece. The conversation was about subsidy, and the two pieces of land were pointed out on the map. I cannot recall the words.

X X 99. Is that all you recollect of the conversation with Smith in any way bearing on the land described in Exhibit M?

Ans. Near as I can recall now, that was the substance of it.

X X 100. Can you recollect what Smith said in reply to that offer on your part?

Ans. Only in general terms; he said the piece nearest to town was what the company needed most; and the other pieces would bring me all the money I ever would want or need, or some such words.

X X 101. Can you recollect when that conversation with Smith took place?

Ans. No, sir, not exactly; it was some days before the 30th of June, 1873; how many I do not remember exactly.

564 X X 102. Can you recollect when the conversation referred to with Starr took place?

Ans. Not now; it was not long from the time of the conversation with Smith.

X X 103. Can you remember whether it was before or after?

Ans. No, sir; I cannot now.

X X 104. Do you recollect any particular talk with Atkinson concerning the donation to the Northern Pacific Railroad Company of the tract of land described in Exhibit M?

Ans. I might have talked with him about that piece of land, or not; I cannot remember now.

X X 105. You stated, Mr. Carr, in answer to R. D. interrogatory No. 54, that after the struggle between you and Mr. George E. Atkinson for the possession of the deed known here as Exhibit M, Mr. Atkinson took the deed and went off with it, and met your father and gave it to him. Where did Mr. Atkinson meet your father?

Ans. Outside my door; I do not know how many steps away.

X X 106. Have you yet produced to the referee the patent to the land in controversy, which you promised to bring to him?

Ans. No, sir; I have not been to my home since this trial began.

X X 107. Have you receipts for taxes paid on the land in controversy since 1873?

Ans. Yes, sir; I think I have them all.

X X 108. Will you produce them also for the referee to inspect?

Ans. Yes, sir; I will.

AUGUST 3D—FRIDAY.

Present: Plaintiff A. P. Carr and his attorneys, and Messrs. John Arthur and George Fuller, of counsel for defendant.

565 Witness produced original patent for his pre-emption claim, to take place of "Exhibit D."

Also tax receipts numbered from 1 to — inclusive, and ordered filed.

Also deed A. P. Carr to R. V. Staley for one acre of land in said tract. Deed dated January 17, 1883, and recorded July 21, 1883.

X X 109. When was this deed of yours to R. V. Staley for one acre of land in controversy here, made out?

Ans. About the time of its date, 17th January last.

X X 110. How near that time?

(Objected to as immaterial and irrelevant.)

Ans. My recollection is, the same day it was executed.

X X 111. On what day was it executed?

(Same objections.)

Ans. 17th of January last.

X X 112. In whose handwriting is the body of the deed?

(Same objections.)

Ans. I believe it is in my handwriting.

X X 113. Are you sure that it is in your handwriting?

(Same objections.)

Ans. I could be sure by examining it. (Deed shown.) Yes, that is my handwriting.

X X 114. Mr. Carr, the writing in this deed bears every evidence of being not more than three or four weeks old. Are you sure that it was done so far back as the 17th of January?

Ans. The deed was filled the day it was acknowledged or possibly the day before it was acknowledged; I am positive about that. I am positive it was done as far back as the 17th of January.

566 X X 115. Is Ray E. Corinne, one of the witnesses to this deed, residing now at Tacoma or New Tacoma?

Ans. No, sir.

X X 116. Where is he residing?

Ans. I believe he has a claim on the Bay, six or eight miles below Tacoma, and is residing on his claim, I believe.

X X 117. Mr. Carr, have you the note for $475 from Lewis Caldwell, for the unpaid balance of purchase-money of the acre of this land in controversy, sold to him?

(Objected to as immaterial and irrelevant.)

Ans. No, sir; I have not.

X X 118. Where is it, Mr. Carr?

Ans. Caldwell came to me some weeks ago, told me he could not pay the balance on the land, and wanted to give me up the bond and take back his note, and the money paid to me—and it was done. This explains, as near as I can get at it, what become of the note.

X X 119. Did he release to you that acre of land?

(Same objections.)

Ans. He did.

X X 120. By what instrument?

(Same objections.)

Ans. I gave him his note, the amount of money he had paid me; he gave me my bond, which I destroyed.

X X 121. What was the date of this transaction?

(Same objections.)

Ans. I cannot say now; I do not remember.

X X 122. State as nearly as you can.

(Same objections.)

567 Ans. I cannot tell exactly—six or eight weeks ago—maybe less, maybe more.

X X 123. Was the bond ever recorded?

(Same objections.)

Ans. No, sir.

(Signed) A. P. CARR.

568 [Endorsed:] In the district court of the third judicial district of the Territory of Washington, holding terms at New Tacoma, in and for the county of Pierce. Anthony P. Carr, plaintiff, *vs.* The Tacoma Land Company and Lake Superior and Puget Sound Company, defendants. Filed June 30th, 1890. A. Reeves Ayres, clerk. Filed Nov. 26, 1888. A. Reeves Ayres, clerk, by T. O. Abbott, deputy clerk.

569 The United States of America to all to whom these presents shall come, Greeting:

Whereas, Robert Sproul, of Pierce county, Washington Territory, has deposited in the General Land Office of the United States, a certificate of the register of the land office at Olympia, Washington Territory, whereby it appears that full payment has been made by the said Robert Sproul according to the provisions of the act of Congress of the 24th of April 1820, entitled "An act making further provision for the sale of the public lands for the west half of the northeast quarter, and the east half of the northwest quarter of section eight in township twenty north, of range three east, in the district of lands subject to sale at Olympia, Washington Territory, containing one hundred and sixty acres according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Robert Sproul—

Now, know ye, that the United States of America in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant unto the said Robert Sproul, and to his heirs, the said tract above described:

To have and to hold the same together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said Robert Sproul, and to his heirs and assigns forever, subject to any vested and accrued water rights for mining, agriculture, manufacturing, or other purposes, and the rights to ditcher and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decision of courts, and also to the rights of the proprietor of a vein or lode to extract and remove said ore therefrom should the same be found to penetrate or intersect the premises hereby granted or provided by law.

In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the thirteenth day of December, in the year of our Lord one thousand eight hun-

dred and seventy-five, and of the Independence of the United States the one hundredth.

By the President:

[SEAL.] U. S. GRANT,
By D. D. CONE, *Secretary.*

C. W. HOLCOMB,
Recorder of the General Land Office.

Recorded vol. 10, page 245.
Filed and recorded June 30, 1883, at 2 o'clock p. m.

W. B. KELLER,
County Auditor,
Per W. A. WILLIAM, *Dep.*

570 [Endorsed:] In dist. court. Carr *vs.* Fife *et al.* Def'ts' Exhibit 3. C. B. Eaton, referee. Filed Nov. 26, 1888. A. Reeves Ayres, clerk, by T. O. Abbott, deputy clerk.

571 No. 491.

Examination of title to the east half of the northwest quarter and the west half of the northeast quarter of section eight, in township twenty north, of range three east, of the Willamette meridian, in Pierce county, W. T.

1st.

Grantor: L. M. Starr *et al.* Grantee: M. M. McCarver.
No. of transfer: 1. Record of instruments: Vol. 3, page 371.
Kind of instrument: W. D.
Consideration: $1.00.
Date of instruments: Day 13th; month, March; year, 1872.
When recorded: 50 cts. rev. stamp; day, 6th; month, May; year, 1872.
Description of property, remarks, etc.: Southwest ¼ of northeast ¼ of section 8, in t'p 20 No., R. 3 E.

2nd.

Grantor: M. M. McCarver.
Grantee: E. S. Smith.
No. transfer: 2.
Record of instruments: Vol. 3, page 625.
Kind of instrument: Agreement.
Consideration: $1,600.00.
Date of instrument: 26th July; year, 1872.
When recorded: 10th day January, 1873; 50 cts. rev. stamp.
Description of property, remarks, etc.: Agrees to convey ½ of the S. W. ¼ of N. E. ¼ of section 8, in t'p 20 N., R. 3 E., of W. M.

3rd.

Grantor: M. M. McCarver *et ux.*
Grantee: E. S. Smith.
No. transfer: 3.
Record of instruments: Vol. 4, page 223.
Kind of instrument: Q. C. D.
Consideration: $1,600.00.
Date of instrument: 24th day; month, September; year, 1873.
When recorded: 24th day; month, September; year, 1873.
Discription of property, remarks, etc.: Undivided ½ of S. W. ¼ of N. E. ¼, sect. 8, T. 20 N., R. 3 E.

572 4th.

Grantor: F. M. Lamper, receiver.
Grantee: Anthony P. Carr.
No. of transfer: 4.
Record of instrument: Vol. 7, page 335.
Kind of instrument: Rcpt. Consideration: $22.00.
Date of instrument: 28th day June; year, 1871.
When recorded: 15th day Sept.; year, 1879.
Description of property, remarks, etc.: Fee for entry of W. ½ of N. E. ¼ and E. ½ of N. W. ¼, sect. 8, in t'p 20 N., of R. 3 E.

5th.

Grantor: United States.
Grantee: Robert Sproule.
No. of transfer: 5.
Record of instruments: Vol. 13, page 431.
Kind of instrument: Patent.
Date of instruments: 13th day Dec.; year, 1875.
When recorded: 30th day June; year, 1883.
Description of property, remarks, etc.: W. ½ of N. E. ¼ and E. ½ of N. W. ¼ of sect. No. 8, in t'p 20 N., of R. 3 E.

6th.

Grantor: Josephine Carr.
Grantee: A. A. Wentworth.
Record of instruments: Vol. 4, page 639.
Kind of instrument: Q. C. D. Consideration: Land.
Date of instruments: 23rd Jan'y, 1875.
When recorded: 5th Feb'y, 1875.
Description of property: W. ½ of N. E. ¼ and E. ½ of N. W. ¼, sect. 8, t'p 20 N., R. 3 E.

7th.

Grantor: A. A. Wentworth *et ux.*
Grantee: A. P. Carr.
Record of instruments: Vol. 4, page 640.

Kind of instrument: Q. C. D. Consideration: $1.00.
Date of instrument: 23rd Jan'y, 1875.
When recorded: Feb'y 5th, 1875.
Description of property: W. ½ of N. E. ¼ and E. ½ of N. W. ¼, sect. 8, T. 20 N., R. 3 E.

8th.

Grantor: Robert Sproul *et ux.*
Grantee: John M. Goodwin.
Record of instruments: Vol. 4, page 756.
Kind of instrument: W. D. Consideration: $1,000.00.
Date of instrument: 15th June, 1875.
When recorded: 16th June, 1875.
Description of property: The undivided ½ of W. ½ of N. E. ¼ and E. ½ of N. W. ¼, sect. 8, t'p 20 N., R. 3 E.

573 9th.

Grantor: Robert Sproul *et ux.*
Grantee: H. A. Fife.
Record of instruments: Vol. B, page 45.
Kind of instrument: M't'g. Consideration: $525.00.
Date of instrument: 29th Dec., 1875.
When recorded: 31st Dec., 1875.
Description of property: The undivided ½ of W. ½ of N. E. ¼ and E. ½ of N. W. ¼ of sect. 8, t'p 20 N., R. 3 E.

10th.

Grantor: John M. Goodwin *et ux.*
Grantee: Richard D. Rice.
Record of instruments: Vol. 5, page 488.
Kind of instrument: W. D. Consideration: $1.00.
Date of instrument: 17th April, 1876.
When recorded: 25th Nov., 1876.
Description of property: The undivided ⅓ of the undivided ½ of the W. ½ of N. E. ¼ and E. ½ of N. W. ¼ of sect. No. 8, t'p 20 N., R. 3 E.

11th.

Grantor: B. A. Young, sheriff.
Grantee: Ira Cogswell.
Record of instrument: Vol. 7, page 351.
Kind of instrument: Sh'ff deed.
Consideration: $1,028.76.
Date of instruments: 16th Aug., 1879.
When recorded: 24th Sept., 1879.
Description of property: Roberts Sproul's interest in undivided ½ of W. ½ of N. E. ¼ and E. ½ of N. W. ¼, sect. 8, t'p 20 N., R. 3 E.

12th.

Grantor: Harriet A. Fife *et al.*
Grantee: M. J. Cogswell.
Record of instruments: Vol. B, page 789.
Kind of instrument: Ass't of m't'g.
Consideration: $492.80.
Date of instrument: 25th Aug., 1879.
When recorded: 6th Nov., 1879.
Description of property and remarks: Assign the mortgage made by Sproule and wife to H. A. Fife. Recorded: Vol. B, page 45 (one-half interest in).

13th.

Grantor: John M. Goodwin *et ux.*
Grantee: Edward S. Smith.
Record of instruments: Vol. 9, page 322.
Kind of instrument: W. D. Consideration: $1.00.
Date of instrument: 17th April, 1876.
When recorded: 8th Nov., 1881.
Description of property: Undivided $\frac{1}{3}$ of an undivided $\frac{1}{2}$ of the W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ and E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, sect. 8, t'p 20 N., R. 3 E.

574 14th.

Grantor: Josephine Carr.
Grantee: Anthony P. Carr.
Record of instrument: Vol. 9, page 476.
Kind of instrument: Deed. Consideration: Division of property.
Date of instrument: 24th Jan'y, 1875.
When recorded: 1st Feb'y, 1882.
Description of property: W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ and E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, sec. 8, T. 20 N., R. 3 E.

15th.

Grantor: Ira Cogswell.
Grantee: M. J. Cogswell *et als.*
Record of instruments: Vol. 10, page 239.
Kind of instrument: Q. C. D.
Consideration: $1.00.
Date of instrument: 25th Aug., 1879.
When recorded: 14th April, 1882.
Description of property: Undivided $\frac{1}{2}$ of E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ and W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, sec. 8, t'p 20 N., R. 3 E.

16th.

Grantor: Rich'd D. Rice *et ux.*
Grantee: Albert S. Rice.
Record of instrument: Vol. 13, page 173.
Kind of instrument: W. D. Consideration: Valuable consideration.

Date of instrument: 7th July, 1880.
When recorded: 12th May, 1883.
Description of property: Undivided $\frac{1}{3}$ of undivided $\frac{1}{2}$ of W. $\frac{1}{2}$ of N. E. — and E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of sect. 8, t'p 20 N., R. 3 E.

17th.

John M. Goodwin *et ux.* (grantor).
Grantee: Edward S. Smith.
Record of instruments: Vol. 13, page 348.
Kind of instrument: Q. C. D.
Consideration: $1.00.
Date of instrument: 15th April, 1882.
When recorded: 15th June, 1883.
Description of property: Undivided $\frac{1}{2}$ of W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ and E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, sec. 8, in T. 20 N., R. 3 E.

18th.

Grantor: Albert S. Rice *et ux.*
Grantee: Edward S. Smith.
Record of instruments: Vol. 13, page 476.
Kind of instrument: Q. C. D.
Consideration: $1.00.
Date of instrument: 26th June, 1883.
When recorded: 13th July, 1883.
Description of property: All interest in undivided $\frac{1}{2}$ of W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ and E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, sect. 8, T. 20 N., R. 3 E.

575 19th.

Grantor: Smith, Fife & Cogswell.
Grantee: File plat Smith & Fife's add'n.
Record of instruments: Vol. 1, page 63.
Kind of instrument: Plat.
Date of instrument: 22nd Oct., 1883.
When recorded: 25th Oct., 1883.
Remarks: File map entitled (Map of Smith & Fife's addition to New Tacoma, W. T.), covering W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ and E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, sect. 8, T. 20, 3 E.

20th.

Grantor: Edward S. Smith & *et ux.*
Grantee: George O. Kelley.
Record of instruments: Vol. 1, page 149.
Kind of instrument: Power of att'y.
Date of instrument: 21st March, 1875.
When recorded: 6th July, 1875.
Remarks: Authorize Kelley to mortgage or convey real estate in Washington Territory.

21st.

Grantor: Henry Winsor, sheriff.
Grantee: W. H. Fife and M. J. Cogswell.
Record of instrument: Vol. 17, page 151.
Kind of instrument: Sh'ff deed.
Consideration: $800.00.
Date of instrument: 10th June, 1884.
When recorded: 8th July, 1884.
Description of property: ½ of W. ½ of N. E. ¼ and E. ½ of N. W. ¼, sect. 8, T. 20 N., R. 3 E.

22nd.

Grantor: Albert S. Rice *et ux.*
Grantee: Edward S. Smith.
Record of instrument: Vol. 19, page 75.
Kind of instrument: Q. C. D.
Consideration: $1.00.
Date of instrument: 28th Nov., 1884.
When recorded: 12th June, 1885.
Description of property: Undivided ½ of W. ½ of N. E. ¼ and E. ½ of N. W. ¼, sect. 8, in t'p 20 N., R. 3 E.

23rd.

Grantor: John M. Woodwin *et ux.*
Grantee: Edward S. Smith.
Record of instrument: Vol. 19, page 77.
Kind of instrument: Q. C. D.
Consideration: $1.00.
Date of instrument: 12th Nov., 1884.
When recorded: 12th June, 1885.
Description of property: Undivided ⅔ of ½ of the W. ½ of N. E. ¼ and E. ½ of N. W. ¼ of sect. 8, T. 20 N., R. 3 E.

576 24th.

Grantor: Mary E. Clark *et al.*
Grantee: Spinning & Gloyd.
Record of instruments: Vol. 19, page 367.
Kind of instrument: Q. C. D.
Consideration: $250.00.
Date of instrument: 25th Feb., 1886.
When recorded: 25th Feb'y, 1886.
Description of property: Undivided ½ of W. ½ of N. E. ¼ and E. ½ of N. W. ¼ of sec. 8, in t'p 20 N., R. 3 E.

25th.

Grantor: Spinning & Gloyd.
Grantee: Cogswell & Fife.
Record of instrument: Vol. 18, page 639.

Kind of instrument: Q. C. D.
Consideration: $1.00.
Date of instrument: 12th March, 1886.
When recorded: 12th March, 1886.
Description of property: E. ½ of N. W. ¼ and W. ½ of N. E. ¼ of sect. 8, in t'p 20 N., R. 3 E.

577 1.

Lewis M. Starr and His Wife, Eliza J. Starr, and E. A. Starr
to
M. M. McCarver.

Convey with other land in Pierce county, Washington Territory, the south half of the northeast quarter of section No. eight (8), township No. 20 (twenty) north of range three (3) east, W. M. This would cover the S. W. ¼ of N. E. ¼ sect. 8 T. 20 N. R. 3 E. which is embraced in Smith & Fife's addition to Tacoma, but none of the parties to this conveyance had any interest in said property, as appears of record at the time of making this deed.

2.

M. M. McCarver
to
E. S. Smith.

Agrees that he will convey to said Smith the undivided one-half interest in the south half of the northeast quarter of section No. eight (8), township No. twenty (20), north of range three (3) east W. M.

3.

M. M. McCarver and His Wife, Julia A. McCarver,
to
E. S. Smith.

Quitclaims the undivided one-half of the south half of the northeast quarter of section No. eight, township No. twenty, north of range three east, with other lands in Pierce county, Wash. Ter.

578 4.

Homestead.

Duplicate Receiver's Receipt No. 1368; *Application No.* 1368.

RECEIVER'S OFFICE, OLYMPIA, W. T., *June 28th*, 1871.

Received of Anthony P. Carr the sum of twenty-two dollars — cts., being the amount of fee and compensation of register and receiver for the entry of W. ½ of N. E. ¼ and E. ½ of N. W. ¼ of sect. 8, in township 20 north, of range 3 east, under the act of Congress

approved May 20th, 1862, and March 21st, 1864, entitled "An act to secure homesteads to actual settlers on the public domain."

$22.00. F. M. LAMPER, *Receiver.*

(On margin in the following: "Act July 15th, 1870.")

5.

United States of America
to
Robert Sproule.

Grants the west half of the northeast quarter and the east half of the northwest quarter of section eight, township twenty north of range three east, in the district of lands subject to sale at Olympia, Washington Territory, containing one hundred and sixty acres, subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of courts, and also subject to the rights of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted as provided by law.

579 and E. ½

General Land Office Record, volume 10, page 245.

6.

Josephine Carr
to
A. A. Wentworth.

In consideration of lots five and six, in block two, in Tacoma, Pierce county, Washington Territory, does hereby remise, release, relinquish, and forever quitclaim all her right, title and interest, and dower in the W. ½ of N. E. ¼ and E. ½ of N. W. ¼, section 8, T. 20 N., R. 3 E., with other land.

7.

A. A. Wentworth and His Wife, Margaret A. Wentworth,
to
A. P. Carr.

Quitclaim all right, title, interest, and dower in and to the west ½ of N. E. ¼ and E. ½ of N. W. ¼ of section 8, T. 20 N., R. 3 E., and other land, in Pierce county, W. T.

8.

Robert Sproule and His Wife, Mary E. Sproule,
to
John N. Goodwin.

Convey the undivided ½ interest in and to the west half of the northeast quarter and east half of the northwest quarter, section No.

8, in township No. 20, range 3 east, in Pierce county, Washington Territory.

580 9.

Robert Sproule and His Wife, Mrs. Mary Sproule,
to
H. A. Fife.

Mortgage, with other land the undivided one-half of the W ½ of the N. E. ¼ and the E. ½ of the N. W. ¼ of section eight, township 20, north of range three east, situated in Pierce county W. T., to secure payment of $525.00, on the first day of July A. D. 1876, with interest payable monthly at two per cent. per month, according to the terms of a certain promissory note, of even date herewith made by said Robert Sproule, payable to said H. A. Fife. This mortgage foreclosed and sheriff's deed given to Fife & Cogswell.

10.

John N. Goodwin and His Wife, Suzan H. Goodwin,
to
Richard D. Rice.

Quitclaim one undivided third part of the undivided half of the west half of the northeast quarter and the east half of the northwest quarter section No. eight, in township No. 20, range three east, in the county of Pierce and Territory of Washington. Covenanting that said premises are free from encumbrances and that they will warrant and defend the same from all lawful claims whatsoever.

581 11.

B. A. Young, Sheriff of Pierce County, Washington Territory,
to
Ira Cogswell.
Sheriff's Deed.

Recites that by virtue of a writ of attachment issued out of and under the seal of the district court, of the 3rd judicial district of Washington Territory, within and for the county of Pierce, issued October 6th, 1877, in an action then and there pending in said court, wherein Ira Cogswell was plaintiff and Robert Sproule and Michael Padden, were defendants, to the sheriff of said county, issued and delivered, commanding him that out of the property of said defendants he attach and safely keep sufficient property of said defendants, to satisfy and as security for the payment, of the judgment thereinafter rendered against said defendants in favor of said plaintiff, that the said sheriff did, under and by virtue of said writ of attachment, on the 8th day of October, A. D. 1877, attach all the right, title, interest and claim which said defendant Robert Sproule then had and claimed in and to the property hereinafter described and at the time of the issue and levy of the writ of execution here-

inafter mentioned, still held said premises under said attachment, that by virtue of a writ of execution, issued out of the said district court, under the seal of said court, tested the 27th day of August, A. D. 1878, upon a judgment recovered in said court, in said action on the 18th day of January, A. D. 1878, in favor of Ira Cogswell, and against Robert Sproule and Michael Padden, to the said sheriff issued
582 and delivered commanding him that out of the personal property of said judgment debtors in his county, he should cause to be made certain moneys in said writ specified, and if sufficient personal property of the said judgment debtors could not be found then he should cause the amount of said judgment to be made out of the real property of said judgment debtors, not exempt from execution by law, that sufficient personal property of said judgment creditors could not be found, whereof the said sheriff could cause to be made the moneys specified in said writ, the said sheriff did in obedience to said writ of execution, levy on, take, seize and hold in execution, all the right, title, interest and claim which the said judgment debtor Robert Sproule, had in and to the said lands, real estate and tenements, hereinafter particularly set forth and described with the appurtenances, the same being then and there held by said sheriff, under the attachment aforesaid, as security for the payment of the said judgment, that said sheriff under the said execution, did on the 10th day of October, A. D. 1878, sell all the right, title, interest and claim, of the said judgment debtor Robert Sproule, in and to the said premises by him owned and held on the said 8th day of October, A. D. 1877, and at the time of said sale by him owned and held at public auction at the court-house door in the city of Steilacoom, in Pierce county, Washington Territory, at 10 o'clock a. m., after
583 having given due and legal notice of the time and place of such sale according to law, at which sale all the right, title, interest and estate and claim of the said judgment debtor in and to the said premises by him owned and held, on the said 8th day of October, A. D. 1877, or at any time afterwards, were struck off and sold to the said second party, for $1,028.76. Said second party being the highest bidder and that being the highest sum bid for the same, whereupon the said sheriff after receiving the said sum of money so bid from said purchaser, gave to the party of the second part such certificate of sale as is by law directed to be given, that said sale was duly confirmed by decree of the said court rendered therein, in the said court on the 15th day of January, A. D. 1879. That six months since the confirmation of said sale have elapsed without any redemption of said premises having been made.

Now, said sheriff as aforesaid, by virtue of the said writ of attachment and said writ of execution and in pursuance of the said sum of money to the sheriff of Pierce county, in hand paid as aforesaid, conveys unto said party of the second part, all the right, title, interest and claim which the said judgment debtor Robert Sproule, had on October 8th, 1877, or at any time afterward or now has in and to all the following-described real property, in Pierce county, Washington Territory, to wit:

584 The undivided one-half of the west half W. ½ of the north-east quarter N. E. ¼ and the east half E. ½ of the northwesr quarter, N. W. ¼, of section eight 8, township 20, north of range three 3 east, with other land containing in all 320 acres. To have and to hold the same as fully and absolutely as the said sheriff can, may or ought to by virtue of the said writs and the statute made and provided, grant, bargain, sell, convey and confirm the same.

Deed presented to clerk of said court, September 23rd, 1879, for endorsement, and record of the sale of the land herein described, entered in the book of levies by him.

12.

Harriet A. Fife and Her Husband, W. H. Fife,
to
M. J. Cogswell.

Grant, bargain, sell, assign, transfer and set over unto said M. J. Cogswell the undivided one-half of the certain indenture of mortgage bearing date the 29th day of December, A. D. 1875, and made and executed by Robert Sproule and wife to said first party, to secure payment of $525.00, together with the promissory note therein described and the money due or to become due thereon, with the interest, which said indenture of mortgage is recorded in the office of the county auditor of Pierce county, Washington Territory, in Book "B" of Mortgages, on pages 45, 46, and 47, December 31st, A. D. 1875.

585 13.

John N. Goodwin and His Wife, Susan H. Goodwin,
to
Edward S. Smith.

Quitclaim one undivided third part of the following-described real estate, to wit: The undivided half of the following tracts of land namely, the west half of the northeast quarter, and the east half of the northwest quarter, of section No. eight, in township No. twenty, range three east in the county of Pierce and Territory of Washington, covenanting to warrant and defend the same against all lawful claims whatsoever.

14.

Josephine Carr
to
Anthony P. Carr.

In consideration of mutual agreement and division of property does hereby remise, release, relinquish and convey unto said Anthony P. Carr, his heirs and assigns forever, all her right, title, interest and claim whatsoever in and to the west ½ of N. E. ¼ and east half of N. W. ¼ sec. eight (8) T. 20 N. R. 3, E. in Pierce county, Washington Ter. with other lands.

15.

Ira Cogswell
to
M. J. Cogswell and Harriet A. Fife.

Quitclaim with other lands in Pierce county, Washington Territory, the undivided half of the west half (W. ½) of the northeast quarter (N. E. ¼) and the east half (E. ½) of the northwest quarter (N. W. ¼) of section eight (8) township twenty, (20) north of range three east, containing in all 320 acres.

586

16

Richard D. Rice and His Wife, Almira E. Rice,
to
Albert S. Rice.

Quitclaim one undivided third (⅓) part of the following tracts of land, namely: The undivided half of following tracts of land namely: The W. ½ of the N. E. ¼ and the E. ½ of the N. W. ¼ of section eight (8) township No. twenty (20) R. 3 E. in the county of Pierce W. T., with other land, covenanting that they are well seized of the above-granted premises, in fee simple, that they are free from all incumbrances and that they will warrant and defend the same against all lawful claims whatsoever.

17.

John N. Goodwin and His Wife, S. H. Goodwin,
to
Edward S. Smith.

Convey the undivided half of the west half of the N. E. ¼, one quarter, and the east one-half (½) of the N. W. one quarter (¼) of section eight (8) township twenty (20) range three (3) east in the county of Pierce. No witnesses to grantors' signatures.

18.

Albert S. Rice and His Wife, Frances W. Rice,
to
Edward S. Smith.

Quitclaim all right, title and interest in the following real estate, to wit: The undivided half of the following tracts of land, namely: The W. ½ of the N. E. ¼ and the E. ½ of the N. W. ¼ of section number (8) township No. twenty (20) R. 3, E. in the county of
587 Pierce, W. T., being the same premises conveyed by Richard D. Rice, by John N. and Susan H. Goodwin, April 17th, 1876, recorded auditor's office, Pierce county, W. T., record No. five (5), page 488.

There appears to be but one witness to grantors' signature; that one is "E. H. Lowry," but he signs twice as witness.

19.

Map of Smith & Fife's Addition
to
New Tacoma, W. T.

Plat entitled as in the margin and covers the following-described land in Pierce county, Washington Territory, viz: The west half of the northeast quarter and the east half of the northwest quarter of section eight (8) in township twenty (20) north of range three east of the Willamette meridian. The dedication of the streets and alleys as shown on said plat is signed by W. H. Fife, and Harriet A. Fife his wife, M. J. Cogswell and Rebecca Cogswell, his wife, Edward S. Smith by George O. Kelly, his attorney-in-fact, and Mary A. Smith, his wife, by Geo. O. Kelly, his attorney-in-fact.

20.

Edward S. Smith and His Wife, Mary A. Smith,
to
George O. Kelly.

Appoint said Kelly their true and lawful attorney and of each of them and in their names, place and stead or of either of them to enter into and take possession of all or any real estate in Washington Territory, owned or to be owned by them or either of them or in which they or either of them are or may be interested in
588 said Territory, to lease, bargain, sell, mortgage and convey the same and upon such terms and upon such conditions as to their said attorney may seem meet and proper, to execute all leases, contracts, mortgages or conveyances with or without covenants as he may deem proper and for their interest.

21.

Henry Winsor, Sheriff of Pierce County, Washington Territory,
to
William H. Fife and Myron J. Cogswell.
Sheriff's Deed.

Recites: That by virtue and in pursuance of a writ of execution issued out of and under the seal of the district court, holden at New Tacoma for the county of Pierce, in 3rd judicial district, of Washington Territory, on the nineteenth day of December, 1883, on a judgment of foreclosure and sale rendered by said court, at the regular November term thereof, A. D. 1883, on the eleventh day of December, 1883, in favor of William H. Fife and Harriet A. Fife, his wife, and Myron J. Cogswell and Rebecca Cogswell, his wife, plaintiffs, against Robert Sproule and Mary Sproule, defendants, directed to the sheriff of the county of Pierce, aforesaid, commanding him to levy upon, seize and take into execution the mortgaged premises in said execution described, or so much thereof as might be necessary, and make sale thereof ac-

cording to law to satisfy the sum of $1,476.25, due on the note and mortgage referred to in said judgment, with interest thereon from December 11th, 1883, the date of said judgment,
589 at the rate of 2 % per month, together with the sum of $83.70, attorney's fee and costs included in said judgment with interest thereon from the date of said judgment, at 10 % per annum, besides increased costs, including expenses of sale, which said execution was delivered to said sheriff December 1st, 1883, and said sheriff did on that day levy upon, seize and take into execution the whole of the mortgaged premises, being the undivided one-half of the west half of the northeast quarter and the east half of the northwest quarter of section eight (8) in township twenty (20) north, of range three (3) east, (with other land) and having given due notice of sale thereof, did on the 2nd day of February, A. D. 1884, at 9 o'clock a. m. at front door of the county court-house, in the city of Tacoma, in said county of Pierce, and Territory of Washington, sell the same by auction, according to law, as follows: He sold the undivided one-half of that land in Pierce county, Washington Territory, described as the west half of the northeast quarter, and the east half of the northwest quarter of section eight (8) in township twenty (20) north of range three (3) east, containing according to his judgment, 160 acres, to William H. Fife and Myron J. Cogswell, the parties of the second part hereto, for $800.00, said parties being the highest bidders and that being the highest sum bidden for said portion of said mortgaged premises. That said Fife and Cogswell, did at the time of said sale pay to the said sheriff the money bid by them for
590 said land and the said sheriff at the same time gave to them a certificate of the said sale, containing a particular description of the property sold, the price bid for each of the said parcels of land, the whole price paid and stating that said property was subject to redemption at any time before the delivery of the sheriff's deed.

That the said sheriff on May 8th, 1884, duly made return of said sale upon said execution to the said court from which the said execution issued as aforesaid, that said sale was by order of said district court, made at the regular May term thereof, A. D. 1884, on the 27th of May, 1884, duly confirmed and the said sheriff was, by said order directed to execute a deed to the purchasers on said sale or other person entitled to the same, as by law required within five days from the date of said order. That more than five days have elapsed since the said confirmation of said sale, and no redemption of said mortgaged premises so sold as aforesaid has been made.

Now said first party sheriff as aforesaid, in consideration of the premises, and by virtue and in pursuance of the statute in such case made and provided and of every power and authority him thereunto enabling, conveys to said second parties the undivided one-half part of those parcels of land situate in Pierce county, Washington Territory described as the west half of the northeast quarter and the east half of the northwest quarter of section
591 eight (8) in township twenty (20) north of range three (3) east.

Deed presented to clerk of district court for endorsement and entry of sale made in the book of levies, where the levy is recorded July 5th, A. D. 1884.

NOTE.—This is the second recording of this sheriff's deed. It was first filed for record June 10th, 1884, and recorded at page 94, of vol. 17, of deeds. But the certificate of the clerk of the district court was not at that time attached thereto.

22.

Albert S. Rice and His Wife, Frances W. Rice,
to
Edward S. Smith.

Quitclaim all right, title, and interest in the undivided half of the following tracts of land, namely: The W. ½ of the N. E. ¼ and the E. ½ of the N. W. ¼ of section No. eight (8) township No. twenty (20) R. 3 E. in the county of Pierce, W. T., being the same premises conveyed to Richard D. Rice by John N. and Susan H. Goodwin, April 17th, 1876, recorded auditor's office, Pierce county, W. T. Record No. five (5) page 488. (And other land in Washington Territory.)

This deed being given to correct defective execution of two deeds between same parties recorded in Pierce county, W. T., pp. 392 and 476 of volume 13 of deeds, and covers no other or additional interest than is described in those deeds.

592 23.

John N. Goodwin and His Wife, Susan H. Goodwin,
to
Edward S. Smith.

Quitclaim the two undivided one-third parts of the one undivided half part of the west half of the northeast quarter and the east half of the northwest quarter of section eight (8), in township twenty (20) north, of range (3) three east of the Willamette meridian, situate in the county of Pierce and Territory of Washington.

24.

Charles J. Clark and His Wife, Mrs. Mary E. Clark (Formerly the Wife of Robert Sproul),
to
William N. Spinning and Frank H. Gloyd.

Quitclaim an undivided one-half interest in and to those parcels of land in Pierce county, Washington Territory, described as follows: The east one-half (½) of the northwest quarter and the west one-half (½) of northeast quarter (N. E. ¼) of section eight (8), township twenty (20) north, of range three (3) east, of Willamette meridian (and other lands.)

25.

William N. Spinning and Frank H. Gloyd (Both Unmarried)
to
Marion J. Cogswell and William H. Fife.

Quitclaim those parcels of land in Pierce county, W. T., described as follows, to wit: The east half (E. ½) of the northwest quarter (N. W. ¼) and the west one-half (W. ½) of the northeast quarter
593 (N. E. ¼) of section eight (8), township twenty (20) north, of range three (3) east, of the Willamette meridian (with other lands).

The above statement of transfer is intended to show all conveyances and mortgages covering the east half of the northwest quarter of section eight, in township 20 north, of range 3 east, of the Willamette meridian, excepting such transfers as may have been made of lots and blocks in Smith and Fife's addition to New Tacoma, W. T., that have been recorded in the auditor's office of Pierce county, Washington Territory, as now appears from the records of my office.

Dated Tacoma, W. T., October 28th, A. D. 1887.

EDWARD HUGGINS,
Auditor Pierce Co., W. T.,
[SEAL.] By F. H. GLOYD, *Deputy.*

594 [Endorsed:] Anthony P. Carr *vs.* W. H. Fife *et al.* Def'ts' Exhibit 4. C. B. Eaton, referee. Filed June 30th, 1890. A. Reeves Ayres, clerk.

595 *Certificate of Clerk.*

UNITED STATES OF AMERICA, *District of Washington,* } *ss:*

I, A. Reeves Ayres, clerk of the circuit court of the United States for the ninth judicial circuit, district of Washington, do hereby certify the writing hereto attached to be a true transcript of the record, proceedings, and exhibits in case No. 30, of Anthony P. Carr, plaintiff, against W. H. Fife *et al.*, defendants, as fully as the same remain on file and of record in said case in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at my office, in the city of Tacoma, in said district, this 8th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

[Seal United States Circuit Court, District of Washington.]

A. REEVES AYRES,
Clerk of said Court.

Endorsed on cover: Case No. 14,726. Washington C. C. U. S. No. 817. Anthony P. Carr, appellant, *vs.* W. H. Fife & Harriet A. Fife, his wife, *et al.* Filed July 7, 1891.

156-494

156-494

FILED.
OCT 16 1894
JAMES H. McKENNEY,

In the Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1894. *TERM No. 215.*

ANTHONY P. CARR,
Appellant,

vs.

W. H. FIFE AND HARRIET A. FIFE, HIS WIFE, ET AL.,
Appellees.

Appeal from the Circuit Court of the United States for the District of Washington.

BRIEF FOR APPELLANT.

JOHN ARTHUR,
THOMAS CARROLL,
HEBER J. MAY,
Attorneys for Appellant.

SUMNER HERALD PRINT.

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Appellees.

Appeal from the Circuit Court of the United States for the District of Washington.

Statement and Brief on Behalf of Appellant.

THE PLEADINGS AND MOTIONS.

The appellant filed his complaint or bill in the District Court of the Second Judicial District of Washington Territory, at Tacoma, in Pierce county, June 13, 1887. (Rec. 1–5).

The appellant alleges in his complaint that he enlisted as a volunteer in the army of the United States, on June 6, 1861, and served as a soldier in the war of the rebellion for three years; that he re-enlisted and served another year, and that he has remained loyal to the Government. (Rec. 1, par. 1).

That on June 28, 1871, he filed in the United States Land Office at Olympia, Washington Territory, his soldier's homestead declaratory statement and application, No. 1368, for the entry of vacant public land of the United States situated in said land district, in Pierce county, in said Territory, to-wit: The west one-half (½) of the northeast quarter (¼) and the northeast one-half (½) of the northwest quarter (¼) of section eight (8), in township twenty (20) north, of range three (3) east of the Willamette meridian, containing one hundred and sixty (160) acres of land according to the United States survey, and that he, then and there, paid to the receiver the fees prescribed by law, to-wit, twenty-two dollars; that within six months thereafter, he entered upon the land, established his residence thereon, made valuable improvements on it, cultivated it, and that his work and improvements upon said land were reasonably worth one thousand dollars; that he claimed at said land office the benefits of the law relating to soldiers' homesteads, and at the proper time offered to perfect his title, but the register and receiver wrongfully and unlawfully rejected his claim to such benefits and refused and failed to allow him to make final proof for said land. (Rec. 1–2, pars. 2, 3, 4, 5).

That on the 6th day of June, 1873, one Robert E. Sproule commenced, at said land office, a contest against appellant, falsely alleging that he had abandoned his claim to said land; that testimony was taken in said contest, and that thereafter the register and receiver notified appellant that Sproule had failed to prove such abandonment, and that appellant, relying on such notification, gave the matter no further attention, and continued to reside on and improve the land; later on he heard that the land had been patented to Sproule, and upon inquiry at the land office he learned that, contrary to his notice, a finding had been made in favor of Sproule (Rec. 2, par. 6). Upon recommendation of the register and receiver, Sproule was allowed to pre-empt the said land, and received a patent therefor, notwithstanding the claim and the rights of the appellant. (Rec. 3, pars. 7, 8, 9, 10, 11).

It is also alleged in the complaint that Sproule commenced said contest in pursuance of a fraudulent conspiracy between said Sproule, the appellees and their grantors, for the purpose of defeating appellant's homestead claim and of obtaining the land for speculation; that Sproule was not a citizen of the United States when he made his declaratory statement, and that he never declared his intention to become such citizen; that the appellant has remained continuously in possession of said land from the day he entered upon it in 1871, and has not at any time delivered said possession to Sproule, or to the appellees, or to any other person or persons; that the title, interest or claim of appellees, which they acquired through

the fraudulent claim of said Sproule, is a fraud upon the title of appellant; that said appellees, and each of them, at the time when they acquired whatever interest, claim, or title they claim, had full notice and knowledge of the fraudulent actions by which the issuance of said patent to Sproule was procured and effected, and of the claim of appellant to the rightful ownership of said land. (Rec. 3–4, pars. 12–17).

The prayers of the complainant are, that appellees may be required to set forth the nature and extent of their respective claims; that all claims adverse to the appellant may be determined by decree; that by such decree it may be declared and adjudged that the appellees have no claim, title or interest in said land or in any part thereof; that the patent to Sproule was unlawfully issued and is void; that the appellant be adjudged and decreed to be the equitable owner of said land, and that the appellees be required to convey the same to appellant, &c., and that appellees may be forever enjoined from setting up title, etc., to said land. (Rec. 4–5, par. 18).

By consent the names of Andrew C. Smith and George O. Kelly, executors of Edward S. Smith, were substituted for the name of George O. Kelly, administrator. (Rec. 5).

The appellees answered (Rec. 6–8). Subsequently an amended answer and cross-bill were filed (Rec. 8–15). Appellant demurred to the amended answer and cross-bill. The demurrer was overruled as to the amended answer, but sustained as to the cross-bill. (Rec. 15–16).

Appellees say they have no knowledge or information as to the truth of the allegations of the first paragraph of the complaint, which relate to appellant's service in the army; they admit the allegations of the second paragraph of the complaint as to the homestead entry, payment of fees, etc., by the appellant, and that appellant, within six months after 28th June, 1871, entered upon said land as alleged in the third paragraph, but deny his residence thereon, and the improvement and cultivation of the same and the value thereof as alleged; they admit undisputed facts and deny other allegations of the complaint upon information and belief, except the allegations that the lands were wrongfully and unlawfully patented to Sproule in disregard of appellant's rights, which are denied outright; Marion Denton and F. T. Olds deny title or estate in said lands; appellees deny any notice or knowledge of fraudulent acts on the part of Sproule in the issuance of the patent to him, and disclaim any notice of the ownership of appellant to said patent or said land prior to the commencement of this suit, and allege that appellant was not seized of the land within ten years prior to the commencement of this suit. (Rec. 8–10).

Then follows the sixteenth paragraph of the amended answer, divided into twelve sub-divisions, containing new matter and affirmative allegations founded upon information and belief. Appellant is accused of bad faith in making his homestead entry; a history of the contest is given in the most favorable aspect for appellees, and appellant is charged with having wasted the timber on the

land, and also with having abandoned the land and changed his residence therefrom for more than six months since making his entry and next prior to said June 6, 1873, &c., &c. (Rec. 11–13). The possession of Sproule and his grantees is alleged in the seventeenth paragraph. (Rec. 13).

The appellant filed a reply to the amended answer and cross-bill, in which he denies that the register and receiver made a finding in the contest in favor of Sproule and against appellant, but admits that said officers illegally and unwarrantably suggested a cancellation of appellant's homestead entry, and alleges that Sproule was, during the whole of the years 1876-7-8-9, 1880-1-2-3-4, and thereafterwards, out of the Territory of Washington, and never returned thereto. Appellant alleges that Edward S. Smith, since the commencement of his claim in the premises, was out of the Territory of Washington in 1885 for over six months, and died out of said Territory in December, 1885; the allegations of new matter in each of the twelve sub-divisions of paragraph sixteen of the amended answer are denied; the allegations of the quiet possession of the land by Sproule and his grantees, contained in the seventeenth paragraph, are denied, and the quiet possession of the land is alleged to have been in the appellant (Rec. 18–19). The demurrer having been sustained to the cross-bill, the reply thereto will not be noticed (Rec. 19). The cause was referred to an examiner who took and reported the testimony (Rec. 17).

The cause was set down by stipulation for hearing in the Territorial court, on the 26th day of November, 1888, and was submitted for decision on December 17, 1888; but before a decision was rendered the Territory was admitted into the Union as a State. It was then, December 11, 1889, stipulated that the cause be submitted to the Superior Court of Pierce county, State of Washington, for decision upon the pleadings, testimony and briefs of counsel on file. Upon the request of appellees, and notwithstanding the stipulation to submit the cause to the State Court, the cause was on May 26, 1890, transferred to the Circuit Court of the United States for the State of Washington under section 23 of the Act approved February 22, 1889, 25 Stat. L. 683 (Rec. 20, 21, 22). On July 28, 1890, appellant moved in the Circuit Court to remand the cause to the Superior Court of Pierce County. The motion was overruled and the reasons therefor stated in an opinion (Rec. 23, 25-6).

On November 21, 1890, a motion, based on the affidavit of appellant, was made to have the cause tried by Hon. Lorenzo Sawyer, circuit judge, under whose direction Judge Hanford was presiding in the Circuit Court, or by Hon. Matthew P. Deady, district judge for Oregon, for the reason that Judge Hanford had been, since the commencement of the cause and up to the time of his appointment as district judge, counsel for the defendants. Judge Hanford also overruled this motion, for reasons stated in the opinion finally disposing of the cause, and allowed an exception to said ruling (Rec. 24-5, 33). On the 28th day

of January, 1891, a decree was entered dismissing appellant's bill on the merits of the cause (Rec. 37).

A motion was made February 10, 1891, to set aside the decree and remand the cause to the Superior Court of Pierce County, State of Washington, upon the grounds that the same had been improperly removed, and that the Circuit Court had not acquired jurisdiction thereof because it had not been made to appear at the time of such removal that the matter in dispute exceeded, exclusive of interest and costs, the sum of two thousand dollars (Rec. 30). Judge Hanford also overruled this motion and permitted affidavits as to the value of the property to be filed *nunc pro tunc* (Rec. 25-29).

From the decree of the Circuit Court an appeal was prayed and allowed to this court (Rec. 37-39).

STATEMENT OF FACTS UPON THE EVIDENCE.

The character of the testimony adduced in the court below, and upon which the cause was heard and determined, is as follows: Deposition of appellant in his own behalf and exhibits (Rec. 41-43). Depositions of William Mahon, Howard Carr and Dolph Hannah for appellant (Rec. 50, 51, 55, 59). Anthony P. Carr was recalled for himself and also by counsel for appellees for cross-examination (Rec. 59, 62). Copies of certain papers in the contest of Sproule *v.* Carr were put into the record on behalf of appellant by agreement of counsel (Rec. 107-109). Upon the introduction of this testimony the appellant rested his case (Rec. 107).

Counsel for appellees stated that they would not produce witnesses for the purpose of offering oral testimony, but would rely on documentary evidence. They offered in evidence (1), a certified copy of the record in the contest case, Homestead Entry No. 1368, of Sproule *v.* Carr (Rec. 109, 110-205). Counsel for appellant objected to the introduction of the record, except the findings, rulings and decisions of the land office, as incompetent and irrelevant (Rec. 109). (2), The testimony of appellant taken in the case of Anthony P. Carr *v.* The Tacoma Land company and Lake Superior and Puget Sound company (Rec. 109, 205-294). Appellant's counsel objected to the introduction of this record, upon the ground of its incompetency and irrelevancy (Rec. 109). (3), Patent to Sproule

(Rec. 109, 294). (4), Abstract of title (Rec. 110, 295-310). Appellees then rested (Rec. 110).

It will be observed that the cross-examination of appellant is based largely upon the testimony given by him in the contest proceedings (Rec. 80-87) and in the suit referred to (Rec. 98-106). If the objections of counsel for appellant to the admission of these documents in evidence are well taken, there is no testimony of any consequence left in the record for appellees. As to the record in the case of Carr *vs.* Tacoma Land Co. &c., District Court, Third Judicial District of the Territory of Washington (Rec. 206-294), it lacks the proper authentication to make it competent evidence in this cause under Sec. 905, Revised Statutes, and must be eliminated. (United States *v.* Pinson, 102 U. S. 548; Ewing *et al. v.* United States, Wash. Law Rep. pt. 23, Vol. 22, page 367; 1 Green. Ev., Secs. 504, 505, 506, and notes; Turnbull *v.* Payson, 95 U. S 418; 1 Am. and Eng. Encyc. Law, p. 1022, par. 6, and notes).

This ought to take the cross-examination (Rec. 98-106) out of the record also, although we do not think the points brought out therein, namely, appellant's unhappy domestic relations, final desertion by his wife, and what he said incidentally about his home, are very important (Rec. 93). The wife's abandonment of appellant and the land did not affect his homestead entry, but resulted only in the forfeiture of her own rights. (Dickman *v.* Birkhauser, 16 Neb 686; Trawick *v.* Harris, 8 Tex. 312; Earle *v.* Earle, 9 *ib.* 630; Sears *v.* Sears, 45 *ib.* 557; Duke *v.*

Reed, 64 *ib.* 705). But, aside from this, the cause in which the deposition was taken was between parties-defendant other than those to the present suit, and not in privity with them; involved different issues; related entirely to another piece of property; and the introduction of the deposition into this suit for any purpose or in any manner whatever seems to be improper. (1 Green. Ev. Sec. 516; 7 Am. and Eng. Encyc. Law, p. 75).

The copies of the records and papers in the contest case appear to have been properly certified by the Commissioner of the General Land Office under section 891 of the Revised Statutes, which makes them "evidence equally with the originals thereof." If the originals are not competent evidence, the copies are not. This documentary evidence was admitted over the objection of appellant, as heretofore stated. It was held in Smelting Co. *vs.* Kemp, 104 U. S., 636, 647, that the court erred in admitting such a record upon which the patent was issued, for the purpose of impeaching its validity. Would it be error to admit such proceedings in a court of equity with the object of collaterally sustaining the validity of a patent? That is the question here presented.

Having called the attention of the court to the preliminary questions relating to the testimony and its admission, let us now see exactly what the facts are as to the homestead entry of appellant, the contest in the land office, the pre-emption of the land by Sproule and the issuance of the patent to him.

On June 28, 1871, appellant filed his homestead application, No. 1368, at the Olympia land office, to enter the said land, and paid the fees. At the same time he filed his soldier's declaratory statement in the prescribed form (Rec. 107-8). He took possession of the land under such entry within two or three days after the filing of the application (Rec. 62). He served in the war of the rebellion. His first enlistment was for three years, but he was discharged before the expiration of his term by reason of disability (Rec. 42–3). Under section 2305 of the Revised Statutes the appellant was entitled to a deduction of three years—the whole term of his enlistment—from the time required to perfect the title to his homestead entry. On October 17, 1864, appellant enlisted a second time and served one year, the period for which he was enrolled (Rec. 43). He was entitled to another year's credit for this service, making in all four years. It will be noted therefore that, if appellant had been given these deductions, he would have only been required to reside on the land for one year from June 28, 1871, if the law were otherwise complied with, to entitle him to receive a certificate or patent under section 2291 of the Revised Statutes. But he was not permitted by the register and receiver to make final proof of his claim; and when he offered to do so was not only treated roughly, but told by these officers that he had no claim (Rec. 45). Appellant first built a log house, but, upon failure of water, changed the location and built a plank house with a lean-to addition. He found the land heavily timbered and

densely covered with under-brush, but he improved it to the value of $800 or $1000. When he got the house in condition to live in, he moved his family and his household goods to it, and lived there continuously, except when he was temporarily absent at work in order to earn money to live on; he could not make a living on the land and had to be away from the homestead part of the time at work, as he had no money except such as he earned in this way (Rec. 44, 64). The appellant never abandoned the land nor changed his residence therefrom (Rec. 47). Being a poor man, he was compelled to earn at his trade a sufficient amount with which to support his family. The land was covered with a heavy growth of timber and far from any settlement. His wife, being in delicate health, and afraid to remain alone on the land, went with him from time to time to the settlement, where he was part of the time engaged as a photographer, and part of the time doing such odd jobs as he conld find to do (Rec. 44, 64, 85). All of the evidence shows that the land was cultivated and improved in a very respectable manner, when the circumstances are fully considered (Rec. 44, 52, 53, 62, 66, 67, 68, 69, 70, 71). The cultivation and improvement of the land is also shown by the testimony given before the register, a slight difference appearing as to the value placed upon them, which will not materially affect the questions to be considered in this suit (Rec. 80–87). Even the witnesses of Sproule in his contest case admit the improvements, and so does Sproule, although in doing so it is attempted to depreciate their consequence and value

(Rec. 135–152). It is plain that some of these witnesses pretended to examine the land a few days before they gave their testimony, for the purpose of testifying as favorably as possible for Sproule. Sproule swears he was never on the land until about *June 1, 1873*, but nevertheless he commenced the contest proceedings on the 6th day of that month (Rec. 149). And when he was asked where he had resided prior to June 1, an objection was interposed, and the register sustained the objection, and shielded Sproule from answering, and also from stating whether he was willing, at that time, to swear to the contents of the affidavit of contest (Rec. 149, 182–3).

The remarkable manner of making out Sproule's case is shown by the testimony of H. I. Chapman, a surveyor and civil engineer who was working for the Northern Pacific railroad. He made an examination of the land, surveyed some of it, etc., commencing at 11 o'clock A. M., and testified most gloriously to such statements as Sproule needed on the same day, at Olympia, more than forty miles distant from the land, in a country without a railroad (Rec. 176–181).

It is clear from all the evidence in the record that the appellant never abandoned the land nor changed his residence therefrom, and that he never intended to do so.

It is alleged that a fraudulent conspiracy exited for the purpose of defrauding appellant out of his homestead, and the evidence tends to establish this charge. The Northern Pacific railroad was seeking subsidies for its terminus, and its officers and agents were at Tacoma for

this purpose. Appellant did not yield very readily to their solicitations, and he and his homestead became a subject of discussion by E. S. Smith and others, who represented the railroad; and the sentiment was frequently expressed by them, in the billiard room and elsewhere, that appellant's homestead would be "jumped" and taken away from him. None of the old residents, however, undertook it; and Sproule, who knew nothing of the land, became, as he admitted himself, the tool of appellees and their grantors in instituting the contest. The evidence shows that Sproule was a bad and dangerous man, a fugitive from justice at the time; and that he was subsequently hanged (Rec. 55–57, 87–90, 91–92). Sproule says the land was to be conveyed to E. S. Smith or such persons as he might name; and this seemingly was done, as the abstract proves. (A somewhat detailed reference is made to the abstract further on). The land eventually fell into the hands of E. S. Smith and his relatives, connections and partners, who are the appellees herein (Rec. 87–90). It is also plain that all of the appellees, from the notoriety of the contest proceedings, and the publication in the newspaper by appellant of his claim to the land, had notice of his claim and title, and that they are not innocent purchasers. They all lived in Tacoma at the time (Rec. 88–90).

Another branch of the case is, that appellant received from the register and receiver, shortly after the contest trial, a letter in which it was stated that "we find complainant failed to prove abandonment." The letter has been

lost (Rec. 48). Such a letter may have been written for the purpose of misleading and deceiving appellant. The register and receiver are not called to deny the writing of the letter, nor is it shown that they are dead. Whilst the appellant relied on this letter, his attorneys knew the true status of the decision and prepared an appeal to the Commissioner of the General Land Office. So anxious were the register and receiver to pass the case on to the General Land Office, that they did not wait for the brief of appellant's attorneys, but subsequently transmitted it (Rec. 112). The appellant wrote a letter to the Commissioner concerning his claim, believing that the appeal had been taken by Sproule, and not in his own behalf (Rec. 95, 77–9).

Sproule states in his affidavit that he is well acquainted with the tract of land embraced in the homestead entry, and that the said Anthony P. Carr has wholly abandoned said tract and changed his residence therefrom for more than six months since making said entry and next prior to the date herein (Rec. 182–3). It will be remembered that at the time Sproule made this affidavit he had been in the county only about six days (Rec. 148). Appellant was summoned "to respond and furnish testimony concerning said alleged abandonment" (Rec. 183). The issue involved in the contest was therefore the abandonment of the homestead by the appellant.

The register and receiver came to "the conclusion that said A. P. Carr did not wholly abandon his claim"; yet, on August 10, 1873, they assumed *equity jurisdiction*

and recommended the cancellation of his homestead entry upon what they say is sufficient ground in equity only (Rec. 109).

The Commissioner of the General Land Office on October 16, 1873, upon appeal, approved the decision of the register and receiver upon the ground specifically that the land had been abandoned "for more than six months", and quoted at length in his opinion what is now section 2297 of the Revised Statutes, thereby erroneously approving a decision which had not been made by the register and receiver (Rec. 204–5).

The acting Secretary of the Interior found on appeal, May 5, 1874, that appellant, notwithstanding his improvements on the land, had been an "actual resident of the village of Tacoma" for two years after his entry (Rec. 204). By what method he arrived at the two years after entry, which had not expired when the contest began, is not stated. But whatever may be the diversity of these opinions, the homestead entry of appellant was cancelled, and a patent issued to Sproule for the land, December 13, 1875 (Rec. 294).

The allegations and contention of appellant that a conspiracy or combination was formed, fraudulently to deprive him of his homestead entry, are fully supported by the statements of Sproule made upon cross-examination (Rec. 96–7). The allegations are also proved by the abstract of title which is placed in evidence by the appellees. The land was worth at the time of the contest before the register and receiver anywhere from $10,000

to $30,000. One witness offered appellant $10,000 for his claim, but appellant asked $30,000 (Rec. 60). Yet the appellees are found, according to the abstract, conveying this valuable land amongst themselves without real consideration during a period of ten years. The abstract corroborates Sproule's statement that he was to receive a few hundred dollars for being a tool, and conveying the land, when he received a patent, to whomsoever E. S. Smith should designate (Rec. 96–7). It is fair to infer from the character of the conveyances and the considerations named therein that the appellees were fully informed of appellant's claim to the land, and that there was doubt about the title under these deeds. The knowledge of the contest of Sproule against appellant, and of its character, and the manner in which it was brought about, and of the facts prior thereto; the character of Sproule, the unfairness of the contest proceedings, the meaningless, conflicting decisions of the land officers, the disregard of appellant's rights as a soldier, the nominal conveyances of Sproule, one of which was executed before the receipt of his patent, the several conveyances amongst the appellees, which were, it may be said, without consideration,—*all* are facts which, taken together, strongly show that the appellees were not purchasers in good faith within the definition laid down in the latest decisions of this Court upon the subject. (Moelle *v.* Sherwood, 148 U. S. 21, 30; United States *v.* California &c. Land Co. *Ib.* 31). Do the appellees come within the rule quoted from 2 Pomeroy, Eq. Jur., Sec. 745, to-wit: "The essential elements which con-

stitute a *bona fide* purchaser are, therefore, three: a valuable consideration, the absence of notice, and presence of good faith"? (*Ib.* 42).

We ask the attention of the Court to the facts disclosed by the appellees' abstract of title. This abstract shows that Sproule obtained his patent December 13, 1875, but that it was not recorded until 30th June, 1883 (Rec. 294, 295). On June 15, 1875, prior to the issuance of the patent, Sproule and wife conveyed an undivided one-half interest in the land, by warranty deed, to John N. Goodwin for $1000, and the instrument was recorded the following day (Rec. 297, 302, par. 8). April 17, 1876, Goodwin and wife conveyed by quit-claim deed an undivided one-third of said undivided one-half to Richard D. Rice for $1, and the deed was recorded November 26, 1876 (Rec. 297, 303, par. 10). On the same day Goodwin and wife made a like conveyance of the other undivided one-third of said undivided one-half interest in said land to Edward S. Smith for $1, by instrument recorded November 8, 1881 (Rec. 298, 305, par. 13). April 15, 1882, Goodwin and wife executed a quit-claim deed of the entire undivided one-half interest in the land to said Edward S. Smith for $1, and the deed was recorded June 15, 1883 (Rec. 299, 306, par. 17). On July 7, 1880, Richard D. Rice and wife conveyed, by warranty deed, an undivided one-third of the undivided one-half interest in the land, for a valuable consideration, to Albert S. Rice. Deed recorded May 12, 1883, (Rec. 298, 306, par. 16). On June 26, 1883, Albert S. Rice and wife conveyed all their interest in the undivided one-half of

said land to Edward S. Smith by quit-claim deed, which was recorded July 13, 1883, consideration $1 (Rec. 299, 306, par. 18).

It will be noted, therefore, that E. S. Smith, for a nominal consideration, obtained through these conveyances, which are quit-claim deeds, the title to an undivided one-half of this valuable land.

The other undivided one half of the land was mortgaged with other land by Sproule and wife, December 29, 1875, to H. A. Fife for $525. The mortgage was recorded December 31, 1875 (Rec. 297, 303, par. 9). This undivided interest of Sproule appears to have been sold on August 16, 1879, by the Sheriff to Ira Cogswell to satisfy a judgment and attachment in his favor, the consideration in the deed being $1028.76 (Rec. 297, 303, par. 11). H. A. Fife and husband assigned their said mortgage to M. J. Cogswell, August 25, 1879, for $492.80 (Rec. 298, 305, par. 12). From the abstract it seems that this mortgage was foreclosed, and the land sold on June 10, 1884, under a decree of the Court, by the Sheriff for $800; William H. Fife and Myron J. Cogswell being the purchasers (Rec. 300, 307–8, par. 21). On August 25, 1879, Ira Cogswell conveyed this undivided one-half interest to M. J. Cogswell and Harriet A. Fife by quit-claim deed for $1. Recorded April 14, 1882 (Rec. 298, 306, par. 15)

This placed the entire homestead entry of appellant, so far as these conveyances are concerned, in the hands of Edward S. Smith, Harriet A. Fife and M. J. Cogswell, who, on October 22, 1883, platted it and recorded a map of Smith

and Fife's addition to Tacoma, &c. (Rec. 299, 307, par. 19). Who can doubt, upon a careful examination of all the facts in this cause, that Edward S. Smith and the co-appellees herein, who acted with him, were to reap the benefit of the perjury, venality and perfidy of Sproule, and that such was the understanding between them from the day when the contest proceedings were begun before the register, and which resulted in the issuance of a patent to Sproule and in the conveyance of the land by him to said appellees? The facts seem to be absolutely conclusive in favor of this contention.

The appellant invoked the equity jurisdiction of the Courts, and through that channel the cause has reached this Court for final decision.

ASSIGNMENT AND SPECIFICATION OF ERRORS.

1. The Court below erred in dismissing appellant's bill and in entering up a decree for the appellees, when a decree should have been entered for the appellant in accordance with the prayers of his said bill.

2. The register and receiver, the Commissioner of the General Land Office, and the Secretary of the Interior had no jurisdiction to hear, determine and decide the contest case of Robert Sproule *v.* Anthony P. Carr, in homestead entry No. 1368, for alleged abandonment, and said officers had no jurisdiction and authority to declare said homestead entry cancelled and forfeited; notwithstanding and in the face of the fact that said Carr's service in the army, together with his actual residence on the land, exceeded the five years' residence thereon required by section 2 of the Act of Congress approved June 21, 1866, which is now section 2291 of the Revised Statutes, and under which he was entitled to a certificate or patent to said land; and notwithstanding Carr's said homestead entry was exempted from contest for abandonment, after the expiration of said residence of five years, under section 5 of the Act of Congress approved May 20, 1862, which is now section 2297 of the Revised Statutes. Said register and receiver did not constitute a legal tribunal to hear, determine and decide said contest.

3. The Court below erred in holding that the register and receiver had jurisdiction and authority to inquire into

and decide any matter or question in said contest proceedings other than that of the abandonment of the land by the appellant; and in holding that the case of Lee *v.* Johnson, 116 U. S. 48, is analagous to and decisive of this case.

4. The finding or decision of the register and receiver that appellant had not, as alleged by Sproule, wholly abandoned his homestead entry, entitled said appellant to a decision in his favor and to a dismissal of Sproule's contest; and the cancellation and forfeiture of appellant's homestead entry upon said finding or decision was manifest error of law.

5. Robert E. Sproule, who was an alien, was not qualified under the laws of the United States to institute and maintain said contest against appellant, and to preempt said land and to receive a patent therefor, and to be invested with the title thereto.

6. The Court erred in refusing to admit the admissions made by Sproule that he had been hired by the appellees or their grantors fraudulently to contest said homestead claim and deprive the appellant of his title to said land, when such admissions had been passed upon and admitted by the Judge of the Territorial Court.

7. The Court below erred in rejecting appellant's demand that he be credited on his homestead residence with his said period of service as a soldier in the Union army during the war of the rebellion.

8. The Court below erred in overruling appellant's motion and refusing to permit the appellant to try his cause before an impartial Judge, upon an affidavit showing that Hon. C. H. Hanford, District Judge, who was presiding in said Circuit Court under the direction of Hon. Lorenzo Sawyer, Circuit Judge, had been of counsel for the appellees during the pendency thereof in the Territorial Court up to the date of his appointment as Judge.

9. The Court below erred in refusing to remand the cause to the Superior Court of the County of Pierce upon the showing of appellant that the plaintiff and defendants had, after the admission of the State of Washington, and the establishment of the said Circuit Court of the United States, stipulated that said cause might be tried in the said Superior Court for Pierce County.

10. The court below erred in assuming jurisdiction to try the cause before it first affiirmatively appeared that the value of the property in controversy exceeded the sum of $2,000, and in allowing the omission of proof as to such value to be supplied in the record *nunc pro tunc* after the entry of the decree, and in overruling appellant's motion to remand the cause to the State Court upon the ground that it had not been proved that the amount in controversy was sufficient to give the Circuit Court of the United States jurisdiction.

BRIEF.

It will be observed that the appellees deny upon information and belief the allegations of the first paragraph of the bill concerning appellant's services in the army in the war of the rebellion; but these allegations are proved without contest by the discharges of appellant and also by other testimony (Rec. 1, 8, 42-3). Unquestionably he was entitled to credit for these four years on his homestead entry (Sections 2304, 2305, Revised Statutes). His loyalty is proved (Rec. 43).

It is admitted in the answer that appellant filed his homestead application and soldier's declaratory statement in the land office at Olympia on June 28, 1871, for the land in controversy (Rec. 1, 8).

It is also admitted in the answer that appellant, within six months after the filing of his application and soldier's declaratory statement, entered upon said land and established his residence thereon, &c. (Rec. 1, 8-9). The proof shows that appellant took possession of the land within two or three days after he made his application (Rec. 62).

The appellees admit, therefore, by the pleadings, the due filing of appellant on the land and his entry thereon within six months thereafter; and deny only his actual residence for two years before the institution of the contest proceedings. It is not claimed by appellees in the pleadings that appellant did not reside on the land for at least

one year after such entry, which, when added to the four years of service in the army, entitled him to a patent, upon proper proof of cultivation and improvement, and exempted his claim from contest for abandonment. The period of five years, in which the land could revert to the Government under contest proceedings for abandonment, had passed; and the appellant had, from the date of his entry, seven years in which to improve, cultivate, and prove up his homestead claim (Sections 2291, 2297, R. S).

We submit that, upon these admitted facts, the court below would have been justified in entering a decree for appellant in accordance with the prayers in his bill.

FIRST.—Besides the first assignment of error, which is covered by the general arguments, we have assigned specific errors to which we especially ask the attention of the court.

SECOND.—Had the land officers jurisdiction of the contest of Sproule *v.* Carr? Our contention on this point is outlined in the second assignment of error. The evidence discloses that, upon proper investigation by the register, (for we shall insist that the receiver was no part of the tribunal,) he would have ascertained that he had no jurisdiction of such contest proceedings, and ought to have declined to entertain and hear the same. The soldier's declaratory statement of appellant was filed June 28, 1871; and, inasmuch as it was a paper in the record when such contest was begun, it was notice to the register of the existence of the rights of appellant under his home-

stead entry, and imposed upon said register the duty of ascertaining the precise status of the claim before he assumed jurisdiction of the contest for abandonment. If the register had discharged his duty in this respect he would have found that by reason of the expiration of five years he was barred by the statute from taking jurisdiction of the contest for abandonment, which was the only issue the appellant was required to meet in response to the summons. But it is remarkable that this most important feature of the case was disregarded and ignored by the register and other officers of the land department, although their attention was directed to it in the evidence, and in the argument of counsel for appellant. It was the duty of the register and receiver to notify homestead claimants of the expiration of the five-year period, under a form prescribed by the General Land Office (Circular G. L. O., issued Feb 6, 1892, pp. 27, 228). If it was their duty thus to notify appellant, it was most assuredly their duty to inform themselves of the status of his claim under the statutes granting to soldiers distinct and peculiar advantages, as a matter precedent to the assumption of jurisdiction in contest proceedings for abandonment. No attention was given to appellant's rights in this respect; and we regret to say that it appears from the proceedings in the contest that his rights, from the inception of the contest to the cancellation of his claim, were nowhere properly regarded or protected. The contest was commenced by a "claim jumper" and fugitive from justice, who was a bad and dangerous man; and there is something

—yea, a great deal—in the record which makes one feel that a powerful conspiracy existed to deprive this old soldier of his just claim, which he had entered for a home when there was no prospect of its future value. If this court is permitted to go behind the opinion of the register and receiver and consider the evidence upon which it is based, it will be found that the summing up is unfair, unjust, and against the preponderance of the evidence. And, notwithstanding this remarkable summing up, these officers could not bring their consciences up to the mark of declaring that appellant had legally abandoned his claim as charged; but this old soldier had to be ousted in some manner; so they unceremoniously steer a legal question into an equity channel as a *dernier ressort*, and then assume grounds for the recommendation that appellant's homestead claim ought to be cancelled and forfeited (Rec. 188-190).

The Commissioner of the General Land Office approved the decision of the register and receiver, because, he says, the homestead entry "had been abandoned by the claimant for more than six months," notwithstanding the register and receiver had found that such was not wholly the case, and had recommended the cancellation on other grounds. The Commissioner evidently made an effort to stick to the law and disregard equity, and therefore he perfunctorily approved the decision of the register and receiver (Rec. 204-5). Then follows the approval of the Commissioner's decision by the Acting Secretary of the Interior upon a statement contradictory of the documentary

evidence, which shows that two years had not quite elapsed between the date of entry and the date of the commencement of the contest proceedings.

The ground upon which the cancellation and forfeiture were made by the land office is somewhat uncertain. If they were made on account of abandonment, they are not sustained by the decisions of the courts upon the subject. The statutes and the decisions of the courts are favorable to the maintenance of homestead rights generally, and we feel confident that the rulings of the courts will be especially favorable in upholding the rights of a soldier homestead claimant, in view of the fact that, by statute, special privileges have been conferred upon him.

Upon the question of what does or does not constitute abandonment, reference is had to the following decisions: Lehman *v.* Bryan, 67 Ala. 558; Euper *v.* Alkire, 37 Ark. 283; Brown *v.* Watson, 41 *Ib.* 309; Tomlinson *v.* Swinney, 22 *Ib.* 400; Holden *v.* Pinney, 6 Cal. 234; Dunn *v.* Tozer, 10 *Ib.* 171; Moss *v.* Warner, 10 *Ib.* 296; Kenley *v.* Hudelson, 99 Ills. 493; Bradshaw *v.* Hurst, 57 Iowa, 745.

Almost two years having elapsed between appellant's filing and the commencement of proceedings to contest his claim on the ground of abandonment, the land office should not have allowed a contest. The question of his *bona fides* could have been tried when he offered to make his final proof; not before. The land office had knowledge, by appellant's soldier affidavit, that he had served in the army. It should have ascertained the extent of his service and protected his rights thereunder. His five years of

residence were completed before the contest proceedings were begun. The land office, therefore, had no jurisdiction to hear a contest and should have refused it (Grace *v.* Am. Cent. Ins. Co., 109 U. S. 278, 283, and cases cited).

It was urged below by the appellees, and the Judge of the Circuit Court seemed to take the view, that appellant had not in fact made a valid entry upon the land. In his complaint he alleges that he had made a valid homestead entry upon the land, and had entered into the possession thereof within the six months prescribed by the homestead law, and had moved upon it with his family. Appellees, in their answer, admit all these facts. It was, therefore, not necessary that appellant should take proof upon that point farther than he did. Neither was it competent for appellees to offer any proof contradicting appellant's allegation in that respect. If the finding or decision of the register and receiver should be construed to mean that appellant had not made a valid homestead entry, such finding was unauthorized, as no such question was before them in the contest. Sections 2305 and 2308, Revised Statutes, contemplate that the time which the soldier served in the army shall be considered as an actual *bona fide* residence upon and occupancy of the land. In contemplation of law, appellant had lived on the land with his family for four years, night and day, prior to the date of his entry. His entry upon the land gave him a vested right. (Witherspoon *v.* Duncan, 4 Wall. 210, 218; Kansas Pacific R. R. Co. *v.* Dunmeyer, 113 U. S. 626, 644; Shepley *v.* Cowan, 91 U. S. 330, 337.)

Having completed his five years of residence on the land, nothing more was necessary for appellant to do than to make such improvements and cultivation as would show his *bona fide* intention and enable him to make his final proof when he got ready to do so. Under the practice and rulings then in force in the land department, he could do that at any time within seven years from the date of his entry.

On August 22, 1874, the Commissioner of the General Land Office, in the case of G. M. Burlingame, said:

"FIRST.—A soldier who has made an entry under the homestead laws is not required to avail himself of the privileges of the Act of June 8, 1872, as regards the crediting of his term of military service in the United States army during the war of the Rebellion, as a part of the five years' residence and cultivation required by the Act of May 20, 1862. The privilege is optional with himself.

"SECOND.—If the period of a soldier's actual residence upon and cultivation of the land embraced in his homestead entry, the same to be in no event less than one year, added to the term of his military service in the United States Army during the war of the Rebellion, make up the five years required by the Act of May 20, 1862, nothing further of settlement and cultivation is necessary to enable the party to perfect his entry; and he will not violate any legal requirement if, in that case, he should absent himself from the land. The final proof may be made at any

time within seven years from the date of his entry." (Copp's Public Land Laws (Ed. 1875), p. 269.)

The Secretary of the Interior on December 11, 1874, in the case of Burt *v.* Dopp, (Id. p. 270,) said:

"I have examined the case of Courtland S. Burt *v.* Matthew Dopp * * * . Dopp made homestead entry on said premises June 6, 1871, and resided upon and cultivated the same from that date until April 25, 1873. He had been a soldier in the service of the United States in the late Rebellion, and the time of such service, added to the above period of actual residence and cultivation, exceeded five years on the said 25th of April, 1873. Burt, on the 31st of March, 1874, commenced a contest before the local officers, alleging that Dopp had abandoned the land on the 25th of April, 1873, and that the abandonment had continued from and after that date. You held that Dopp should be allowed to make final proof. I think you were right. The time that Dopp was in the military service should be credited as part of the five years' residence required of him. (Act of June 8, 1872, 13 Stats. 333). Including that time, the five years given by the 5th Section of the homestead act, in which to *institute a contest*, had expired before this proceeding was commenced. I affirm your decision."

On June 10, 1874, the Acting Commissioner of the General Land Office wrote to Joseph Fisher as follows:

"In answer to your letter of the 26th ult., I have to say that a homestead settler under act of June 8, 1872, may make proof at such time as his period of actual settlement and cultivation, not less than one year, added to his term of military service, will make five years. After the party has completed the term of five years, as above described, a further residence upon his homestead is not required by law to entitle him to patent, provided satisfactory proof be made within seven years from date of entry." (Id. p. 239).

The rule established in these decisions has never been

changed or modified by either the Land Department or the Courts. In the case at bar, the Land Department had full notice and knowledge that appellant was a soldier and entitled to the benefits of the law of June 8, 1872. (Rec. 111).

His army service was a good consideration for the land. (Mullen *v.* Wine, 26 Federal Reporter, 206, 207).

The doctrine laid down in Marlatt *v.* Silk, 11 Peters, 17, 24, should be applied to this case; so that, in computing the appellant's period of residence upon the claim under the soldier's homestead law, his actual entry upon the land should be considered as having commenced at the beginning of his four years' service in the army. This service could at any time be annexed to a homestead entry, virtually antedating it *pro tanto*. In contemplation of law, appellant made his entry upon the land on the 28th day of June, 1867, and not at the date of his certificate of entry. The law contemplates payment for services rendered to the Government. It had been the policy of the Government prior to the civil war to give land bounties to soldiers. As a substitute for such bounties, the act of June 8, 1872, gives them credit for their period of service upon the five years of residence required by the homestead law. Upon this doctrine, and upon the decisions of the Land Department (*supra*), the local office, in the Sproule-Carr contest, acted without jurisdiction, and contrary to law. Its mistake of the law applicable to appellant's right to the land at the time of the contest was so grave as to call for a total reversal of its action. The appellant

having, within the time provided in such cases, offered to make final proof, and his offer having been rejected by the register and receiver, it was not necessary for him to do more than return to the land and continue to hold his possession of it. (Morrison *v.* Stalnaker, 104 U. S. 214, 215).

Appellant was at that time entitled to his final receipt and to the patent thereon.

The patent having been issued to Sproule in derogation of appellant's rights, and through error of law on the part of the Land Department, Sproule and his grantees should be held as trustees for appellant. (Johnson *v.* Towsley, 13 Wall. 85, 86; Shepley *v.* Cowan, 91 U. S. 340; Mullan *v.* United States, 118 U. S. 278; Moore *v.* Robbins, 96 U. S. 533, 539; United States *v.* Schurz, 102 U. S. 396; Quinby *v.* Conlan, 104 U. S. 426; Smelting Co. *v.* Kemp, 104 U. S. 646; Carpentier *v.* Montgomery, 13 Wall. 480, 496, 497; Widdicombe *v.* Childers, 124 U. S. 404, 405; Monroe Cattle Co. *v.* Becker, 147 U. S. 47, 57).

We may remark here that it is well settled that where a judgment is entered by a court or tribunal when it is without jurisdiction, or when the court or tribunal transcends its jurisdiction in the entry of judgment, such judgment will be held void in either a collateral proceeding or on appeal, unless the appeal be taken to a court of original jurisdiction and the parties appear and consent to the jurisdiction and to a trial. (Collins *et al. v.* Woodruff, 9 Ark. 436; Camp *v.* Wood, 10 Watts (Pa.), 118;

Boswell's Lessee *v.* Otis, 9 How. 336; Kenney *v.* Greer, 13 Ill. 432; Folger *v.* Columbian Ins. Co., 99 Mass. 267; Corwithe *v.* Griffing, 21 Barb. (N. Y.) 9; Barrett *v.* Crane, 16 Vt. 246; Grace *v.* Am. Cent. Ins. Co., 109 U. S. 278, 283, and cases cited; Moore *v.* Town of Edgefield, 32 Fed. Rep. 498).

We question the legality of the tribunal that tried the contest proceedings. The register and receiver jointly heard and determined the case. The statute provides that the abandonment shall be proved "to the satisfaction of the register of the land office," upon whose decision only, it is safe to assert, the land reverts to the Government (Section 2297, R. S.). The receiver, who was not legally a part of the tribunal, took a more active part in the proceedings than the register (Rec. 177). The tribunal was doubled in its *personnel*, and, for aught we know, the receiver may have controlled the decision against the appellant by his superior will power and his influence over the register. Any other citizen would have been as competent as the receiver to preside at the trial. By way of comparison, we may say it was equivalent to calling an additional twelve jurors in a jury trial, where the law specifically provided for only twelve. If the tribunal was an illegal one, its findings and decision were void, and no act or affirmation on appeal, by the Commissioner or the Secretary, could render them valid. It seems to us that the tribunal, consisting of the register and receiver, was a self-constituted body, whose acts are void and not binding on appellant. (Rose *v.* Himely, 4 Cranch, 241, 268-9;

Dynes *v.* Hoover, 20 How. 65; National Bank of Chemung Co. *v.* Elmira, 53 N. Y. 54; Mygatt *v.* Washburn, 15 *Ib.* 321; Kansas Pacific R. R. Co. *v.* Russell, 8 Kansas, 562).

THIRD.—The third error specifically assigned is to the effect that the Court below erred in holding that the register and receiver had jurisdiction to inquire into and decide any matter or question in the contest proceedings other than that of abandonment; and also in holding that the case of Lee *v.* Johnson, 116 U. S. 48, is analagous to, and decisive of, the present case. The facts in the cases are absolutely unlike. Johnson's own admissions clearly show that his homestead claim was against public policy and could not be sustained; that he had not resided on the land; that he did not enter it for himself, but for his son-in-law; that he had not initiated or perfected any right to the land; and that he voted at his real home in Kent County a year after he had made his entry. The court was justified upon this statement of facts in saying: "Upon the testimony the question of abandonment could be of no consequence, as no just right in Johnson's favor had been initiated" (Ib. 53).

It is admitted by the pleadings and established by the proofs that a just right to the land was initiated in favor of Carr; that he entered upon the land within six months after filing his claim. His residence on the land and its improvement and cultivation are proved; he entered the land for himself; he has continued to reside on the land, and has declared upon oath that he never abandoned nor

intended to abandon it. The cases are therefore totally different.

It will not answer to say that the questions decided by the land officers involved matters of fact only, and that such decisions are therefore final. These officers will hardly be permitted to avoid and ignore all questions of law, where they exist as in the case at bar, and confine themselves to the questions of fact only, thereby making their decisions final. This would amount to a denial of justice. The questions of law here presented ought to have been decided by the land officers. They are vital questions in the case, and by ignoring them the appellant has, so far, been deprived of his rights.

The doctrine of Lee *v.* Johnson applied to the case at bar would necessarily hold Sproule's pre-emption filing, with the patent issued thereon, void *ab initio*; it would effect a result the very reverse of that sought by the Circuit Court. Lee *v.* Johnson decides that a homestead claim which is fraudulent in its inception—being taken up by one man for the benefit of another—can be cancelled by the Land Department in any proceeding in which that fact is made to appear to its satisfaction. Had the local land office, in the case at bar, permitted the examination of Sproule which was designed to show that he was an unnaturalized alien, the Land Department would have had no right to permit him to continue the contest or to accept his pre-emption filing, or to issue the patent to him. Had it appeared in the hearing that Sproule's contest of appel-

lant's entry was instigated by and carried through in the interest of a number of land speculators who foresaw the probable large value of the land in the near future as a consequence of coming railroad projects, all of which may be seen in the record, it would have been the duty of the Land Department to dismiss his contest and to award the land to the poor settler who had entered it before any such project was launched. In brief, had the facts been brought out in that contest, the inevitable conclusion against Sproule must have been stated substantially in the language of this Court in Lee *v.* Johnson: "If in any case it appears from the evidence that the claim of the complaining or moving party is against public policy or the law, so that in no event could he recover a final judgment or decision, whatever be the nature or extent of the testimony upon the point at issue, the tribunal should not hesitate to dismiss the suit or the proceeding." (*Ib.* 52).

Johnson entered his claim for the benefit of his son-in-law, Shaeffer; his entry was therefore fraudulent *ab initio*; and it was held that the testimony upon the question of abandonment "could be of no consequence, as no just right in Johnson's favor had been initiated." In the case at bar it is admitted in the pleadings that appellant had made a valid entry; no claim is made that his settlement was not proper and for his own benefit, and not for another. His service in the army, as shown by the rulings of the Land Department and the Courts, placed him in the position of having gone on the land four years prior to the date of his certificate of filing. These rulings and

decisions, and the letter and spirit of the law, mean this or they mean nothing.

No rule or principle of public policy was violated by allowing appellant to acquire a homestead; on the contrary, he belonged to a class of settlers especially meritorious in the eyes of the nation, and for whose benefit Congress, voicing the national sentiment, had provided means of acquiring homesteads on the public lands much easier than those available to the general mass of citizens.

Every consideration of public policy that operated against Johnson operates in favor of the appellant, Carr, in this case.

At the time the contest was instituted the appellant had earned a patent to the land. His cultivation and improvements, in the circumstances disclosed by the record, were sufficient to answer the requirements of the law. It is shown that after the contest he made relatively valuable improvements, and that when he offered to make final proof (Rec. 45-6), there could have been no question as to their adequacy, how stringent soever the rule that might be applied. He is now in a position to invoke against the arbitrary and illegal action of the land officers the doctrine reiterated by this Court in Lee *v.* Johnson:

"If, however, those officers mistake the law applicable to the facts or misconstrue the statutes and issue a patent to one not entitled to it, the party wronged can resort to a Court of Equity to correct the mistake and compel the transfer of the legal title to him as the true owner." (*Ib.* 49)

The right to the patent having vested in appellant, that right could not be divested by the Land Department. The issuing of a patent is but a ministerial act. (United States *v.* Stone, 2 Wallace, 535; Mullan *v.* United States, 128 U. S. 278-9; Wirth *v.* Branson, 98 U. S. 118, 121). In the last case the Court (page 121) says:

"The rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof."

But if it shall be decided that the officers of the General Land Office had jurisdiction, we contend that such jurisdiction, under the facts in this case and the law, did not extend beyond the question of abandonment. The notice of contest served upon the appellant is as follows:

UNITED STATES LAND OFFICE AT OLYMPIA, W. T., June 6, 1873.

"Complaint having been entered at this office by Robert Sproule, against Anthony P. Carr, for abandoning his Homestead entry, Number 1368, dated June 28th, 1871, embracing the West half of N. E. quarter and E. half of N. W. quarter Sec. 8, Tp. 20, North of Range 3, East, in the County of Pierce, W. T., with a view to the cancellation of said entry, the said parties are hereby summoned to appear at this office on the 17th day of July, 1873, at 1 o'clock p. m., to respond and furnish testimony concerning said alleged abandonment.

"J. P. CLARK, Register. ROBERT G. STUART, Receiver."

It will be noticed that appellant was notified to appear "to respond and furnish testimony concerning said alleged

abandonment" (Rec. 183). He appeared, prepared to meet this charge, and did meet it successfully; for the register and receiver were compelled to find that the land had not been "wholly" abandoned, and cancellation of the entry was not recommended upon the issue made. We submit that there is no such thing known to the law as partial abandonment. Abandonment must be "wholly" proved.

The hearing in the land office upon the notice was devoted chiefly to the question of the value and extent of the improvements made by appellant. The decision of the register and receiver against appellant rests upon their pretended opinion that he had not made the valuable improvements required by the homestead law. The register and receiver treated the contest as one against appellant's final proof. They place the burden upon him all the way through. They criticise the character of his house, calling it a "claim shanty;" they disparage the road that he had made to the land as not amounting to anything. They even allowed Sproule a continuance for the purpose of disproving the value of appellant's improvements (Rec. 184). After permitting Sproule to introduce testimony as to the character of the house and other improvements upon the land, they refused to allow appellant to show, by the witness, George W. Byrd, and others, the kind of a house that was on the claim at the time of the contest, or to admit any evidence in appellant's behalf unless the witness had knowledge of the actual condition of the claim before the inception of the contest (Rec. 167-8). This was clearly error of law; and the unfairness of it is

especially noticeable when we find their decision based upon this same kind of testimony against appellant introduced by the contestant. They took a large amount of testimony upon the matter of appellant's having cut, or caused to be cut, logs that were hauled to a saw-mill, etc. The offense of cutting timber, when it is an offense, is a penal one, to be tried by a jury. Forfeiture of the homestead claim is not provided as a penalty; but these petty officers nevertheless imposed it upon the appellant. The criminal jurisdiction they assumed was not conferred upon them by law. Appellant had a right to cut the timber; but even if he had not such a right, these officers had no authority in that proceeding to inquire into the matter. (Bennett *v.* Hunter, 9 Wall. 335-6.) Their conduct in the case was so singular that nobody can examine the record without noticing their evident purpose to make out some sort of a case against the appellant. Assuming to have jurisdiction, and ignoring all limitations upon it, they cast out a drag-net for the raking in of any and every sort of testimony which might help to prejudice appellant's case, and upon which they could make a pretext of basing a pretended equitable finding against him. They ordered a contest contrary to law. They overrode all the statutory limitations upon such a contest; violated the established rules of practice in land office trials; invaded the province of counsel by personal examination of witnesses touching matters wholly outside the proper scope of inquiry; received and entertained evidence without the range of the issue before them;

denied appellant credit for his service in the army; allowed witnesses to testify for the contestant as to the character of improvements, and refused to allow witnesses to testify for appellant on the same subject. (Rec. 167-8, 176). Everything denotes a strong intention and purpose to defeat appellant. It is made very plain that he was not to receive justice or fair treatment before the land office. How can so violent an attitude towards an impoverished and disabled veteran of the war, striving to carve a home out of the forest, be accounted for? Very easily upon the testimony in the record as to the projected establishment, at the time the contest was instituted, of the terminus of the Northern Pacific Railroad in the vicinity of the land in contest. (Rec. 59, 60, 61, 77, 87). The land speculators set a covetous eye upon appellant's claim. They induced a desperate character to assume the *role* of contestant. They organized a fraudulent and wicked conspiracy to defeat the appellant and trample on his rights. The tool of the conspirators, who was an employe of the Northern Pacific Railroad, when he had no further interest in the land, admitted a part of the offense. (Rec. 91, 182). The Hon. Judge of the Circuit Court ruled that the evidence of the statements or confession of Sproule could not be heard, because the appellant was incompetent to testify to admissions of a deceased party, etc. (Rec. 35). The evidence as to Sproule's confession or admission that he was employed by Smith to contest appellant's claim was drawn out by appellees; they did not object to it, nor move to strike it; and it was first objected to in the

Circuit Court. Appellant's demurrer to appellees' cross-bill was sustained, and appellees did not amend; this failure leaves them without claim of title, or right to object to this testimony.

Fraud is provable by circumstances: where these lead to such inference, the onus of disproving is on the parties charged. (Zimmer *v.* Miller, 1 Atlantic Reporter, 858, 860). The circumstances pointing to fraud in this case are shown by the testimony of D. B. Hannah (Rec. 59-62); by the confession or admission of Sproule (Rec. 91, 182); by appellant's letter to the Commissioner of the General Land Office, placed in evidence by appellees, wherein he charges Sproule, Smith and others with conspiring to defraud him out of his land (Rec. 77-79); by the significant fact that the Smith referred to, his family, and his business connections, claim to have succeeded to Sproule's interest in the land, and are the appellees in this action, which is also shown by the abstract of title (Rec. 59, 87, 88, 89, 90, 95, 295-310); by the refusal of the land officers to permit appellant's attorney to examine Sproule in order to prove him to be an alien, and that he had never declared his intention to become a citizen of the United States (Rec. 149); it appears that Sproule subsequently testified on this point, but failed to state such facts as would make him a qualified contestant (Rec. 181); by the like refusal to allow appellant to prove that Sproule had already used his homestead and pre-emption rights; and by Sproule's admission to appellant that he had been hired to contest appellant's entry. (Rec. 90-1, 96-7). These things were

all prejudicial to the appellant and a fraud upon the Government.

Assuming that the land office had jurisdiction to entertain the contest upon the charge of abandonment, it is manifest that no other question was properly before it. (Revised Statutes, 2297. Cooley's Constitutional Limitations, (4th Edition,) 440, 441; Constitution of the United States, Art. 5 of Amendments; Windsor *v.* McVeigh, 93 U. S. 274, 277, 283; Sabariego *v.* Maverick, 124 U. S. 261, 292; Elliott *v.* Peirsol, 1 Peters, 332, 340; Watts *v.* M. R. F. S. & G. R. R. Co., Copp's P. L. L. (Ed. 1883), p. 863; Jones *v.* Roberts, Copp's P. L. L. (Ed. 1875), 251; Snyder *v.* Abbott, Id. 258; Reasore *v.* Whitehead, 2 Copp's Land Owner, 83).

This last case is exactly in point, and was decided by the same Acting Secretary more than a year after the decision of Carr's case. He lays particular emphasis upon the limitations of contest under the homestead act, and the homesteader was held to be called upon to answer only to the charge of abandonment. See, also, Bailey *v.* Townsend, 5 Land Decisions, 176, 177; Waldo *v.* Schleiss, Copp's P. L. L. (Ed. 1875), 234.

The case last cited is specially applicable. It was referred to the Assistant Attorney-General for his opinion. June 2, 1871, the opinion was rendered, and upon it the Secretary of the Interior reversed a decision of the Commissioner of the General Land Office:

"The Commissioner appears to have founded his

decision adverse to claimant on the proof of defective settlement and cultivation, not on proof of abandonment or change of residence. The fifth section of the act of 1862 is as follows:—"That if at any time after filing of the affidavit as required in the second section of this act, and before the expiration of the five years aforesaid, it shall be proven after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit shall have actually changed his or her residence, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government.'

"In the investigation before the register under this section, the main question to be considered was that of REMOVAL OR ABANDONMENT. It seems to me that the sufficiency of the residence under the second section was not the question for determination. That is a matter to be settled at the expiration of the five years. In an examination under Section 5 the question is, 'Has there been a removal or abandonment?' If decided in the affirmative, the land reverts to the Government. If in the negative, the claimant continues in possession until such time as is required by law to make his final proof. I recommend that the decision of the Commissioner be reversed, and that of the local officers be affirmed."

Upon the question of abandonment, in the case at bar, the Register and Receiver say in their decision:—

"From these occasional visits to the claim we can but draw the conclusion that said A. P. Carr did not wholly abandon his said claim, but we are more strongly of the opinion that the utter disregard of the spirit of this munificent law, which gives to the poor man, upon easy and reasonable terms, what he could not otherwise obtain, would, in equity, be sufficient ground for cancellation of his homestead entry." (Rec. 190).

This finding of fact in favor of appellant upon the only question properly before the land office (assuming that it had jurisdiction) entitled him to a decision in his

favor; the conclusion that, notwithstanding appellant did not abandon his claim, his entry should, in equity, be held for cancellation, is error of law, contrary to the finding of facts, and sufficient to entitle appellant to the relief prayed for in this suit.

There was no evidence before the land office showing abandonment or intention to abandon. (Mitchell *v.* U. S. 21 Wall. 352-3; Hurt *v.* Hollingsworth, 100 U. S. 100). Some of the witnesses had seen appellant and his wife in town at a shanty they owned there; all of which he satisfactorily explained. He was compelled to work in town to earn a living. His wife could not remain on the homestead alone, and came to town with him. To save expense they occupied the shanty in town. (Rec. 44). He did the best he could under the circumstances. The homestead law was intended for just such men as appellant; the fabric of civilization west of the Mississippi was reared upon foundations such as he was then laying.

FOURTH.—This specification is covered by the remarks in the third specification.

FIFTH.—The fifth specification of error is upon the ground that Sproule, who was an alien, was not qualified to maintain the contest proceedings against appellant. Homestead and pre-emption claimants for public lands are required to be citizens of the United States or to have declared their intention to become such (Revised Statutes, Sections 2259, 2289). It will hardly be contended that contestants should not have the same qualifications.

Such qualifications are nowhere shown on behalf of Sproule. In fact the register and receiver first ruled out questions upon the subject (Rec. 149). When questioned a second time Sproule effectually admitted that he had no residence (Rec. 181). It was incumbent upon him to prove his citizenship, or that he had declared his intention to become a citizen; but this was not done. He was a witness, yet avoided testifying on this important point. The register had no jurisdiction in the contest proceedings, unless it affirmatively appeared that the contestant was a citizen, or had declared his intention to become a citizen, of the United States.

SIXTH.—Did the Court below err in refusing to admit the admissions of Sproule, made to appellant, to the effect that he had been hired by the appellees and their grantors fraudulently to contest appellant's claim? These statements, in connection with the conveyances of the land, as shown by the abstract of title, are important, and the statements from Sproule were elicited in answer to questions put by counsel for appellees (Rec. 90-1; 96-7). At the time Sproule made the statements it seems he was residing in a shanty on the land and claimed to be in possession thereof (Rec. 92). There is nothing in the record to show that he had parted with his alleged title and possession at the time the statements were made to appellant. Under these circumstances were not the statements admissible as part of the *res gestae*? (1 Green. Ev. Section 109, and notes).

SEVENTH.—This assignment has been argued in the preceding paragraphs.

EIGHTH.—This specification raises the question of the qualification of the judge who presided in the Circuit Court. Appellant filed the following affidavit, after the title of this cause, in said Court:—

"STATE OF WASHINGTON, } ss.
COUNTY OF PIERCE. }

I, Anthony P. Carr, being first duly sworn, depose and say: I am the plaintiff in the above-entitled cause. The Honorable C. H. Hanford, the district judge of and for said district of Washington, before whom said cause is to come on for argument on this day, was, since the commencement of this action and until his appointment as such district judge, *of counsel herein* for the defendants, and in particular for the defendants George O. Kelly and A. C. Smith, as executors as aforesaid.

ANTHONY P. CARR.

Subscribed and sworn to before me this 21st day of November, 1890.

(SEAL). G. W. H. DAVIS,
Notary Public in and for the State of Washington, residing at Tacoma."

Upon this affidavit a motion was made asking that the cause might be tried before an impartial judge. The motion was over-ruled, and an exception allowed. (Rec. 24-5).

It will be noticed that the judge objected to does not state the facts in his opinion as they are set forth in the affidavit. He admits, however, that he had been employed as attorney for some of the appellees before he received his appointment as judge; or, in other words, he does not deny those facts. The motion was overruled by

him upon the ground that, if he did not preside, the operations of the Court would be clogged, and that it would be mere weakness on his part to refuse to perform his functions as a judge; the cause was therefore heard by him and decided in favor of appellees. (Rec. 33). Whilst at common law the fact that a judge had been of counsel for either party did not disqualify him, yet the affidavit in this cause and the judge's own statements, in view of the law as it is administered in this country, ought to have prompted him to retire. For it is said that "next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness or integrity of the judge." (12 Am. and Eng. Encyc. L., 40-1, and note 1; Pearce *v.* Atwood, 13 Mass. 324; Dimes *v.* Proprietors of Grand Junction Canal, 3 H. L. Cas. 759; Queen *v.* Justices, etc. 6 Q. B. 753; Peninsular Railway Co. *v.* Howard, 20 Michigan, 18; Meyers *v.* Shields, 61 Fed. Rep. 712, 727-730.) There was no actual necessity for Judge Hanford to hear and decide the cause.

The constitutions or statutes of the States usually contain provisions regulating the procedure in cases where the judge's disability is shown. The statutes of the United States provide for such disabilities of a judge where he "has been of counsel for either party," but leaves it to the judge's own opinion whether it would be improper for him to preside at the trial (R. S. 601; Spencer *v.* Lapsley, 20 How. 264.)

NINTH.—It is claimed under this specification that the Circuit Court erred in refusing to remand the cause to the State Court upon a showing that the parties had stipulated, after the establishment of the State Court, that said cause should be tried in said State Court. (Rec. 21).

The case was argued before Hon. Frank Allyn, judge of the Territorial District Court, who took it under advisement. Before decision, the Territory was admitted into the Union as the State of Washington, and the Superior Courts of the State became the successors of the District Courts of the Territory. The enabling act provides that actions depending in the Territorial Court, that could have been brought in the Circuit Court of the United States had there been one, may, on motion, be transferred to the Circuit Court of the United States (25 Stat. 683). Upon the organization of the Superior Court of the State of Washington in and for said County of Pierce, a stipulation by the attorneys for the respective parties that the said Superior Court should try said cause, was signed and filed. Afterwards, upon a change of attorneys on the part of appellees, and upon the written request of their attorney, the cause was transferred to the Circuit Court of the Ninth Circuit, District of Washington (Rec. 21, 22). Appellant moved to remand the cause to the Superior Court, which motion was denied (Rec. 32, 33).

Much depends here upon the effect that shall be given to the stipulation. Did it give the State Court jurisdic-

tion? It was a stipulation to re-submit the cause to the Superior Court for decision "upon the pleadings, testimony and briefs of counsel on file". Did not the stipulation divest the parties to the suit of all control over the cause? If so, was not the newly employed attorney estopped from removing the cause several months after the stipulation had been filed? If such is the case, the Circuit Court was without jurisdiction, and erred in refusing to remand the cause to the State Court. Stipulations or agreements of attorneys, within their authority, are usually enforced by the Courts (Halliday *v.* Stuart, 151 U. S. 229, and cases cited).

TENTH.—The Court below assumed jurisdiction, heard and determined the cause, before it affirmatively appeared that the amount in controversy exceeded $2000. The cause was argued before Hon. C. H. Hanford, who, on the 7th day of January, 1891, filed his opinion therein (Rec. 31; 44 Fed. Rep. 713); on the 28th of January, 1891, a decree was entered, in accordance therewith, dismissing appellant's bill, with costs (Rec. 37). February 10th, 1891, appellant moved to vacate the decree and remand the cause to the Superior Court of said County of Pierce, upon the ground that as it nowhere appeared in the pleadings, evidence, or by affidavit, that the amount in controversy exceeded $2000, the Circuit Court of the United States had no jurisdiction to enter said decree or to try said cause; which motion was overruled by the Court, after allowing appellees to file affidavits *nunc pro*

tunc to the effect that the value of the property in controversy exceeded $2000 (Rec. 25, 26, 27, 30).

The presumption is that a cause is without the jurisdiction of the Circuit Court unless the contrary affirmatively appears (Grace *v.* Am. Cent. Ins. Co. 109 U. S. 278, and cases cited; Peper *v.* Fordyce, 119 *Ib.* 469; Turner *v.* Bank, 4 Dall. 8; Livingston *v.* Van Ingen, 1 Paine, 45).

It is beyond doubt that the jurisdictional amount had not been established when the decree was entered. The question is, had the Court the power to remedy the defect by a *nunc pro tunc* order? The order in this cause appears to have been made for the purpose of supplying a past omission of the Court concerning its jurisdiction; which is not allowable (Nabers *v.* Meredith, 67 Ala. 333; Smith *v.* Hood, 25 Pa. St. 218; Gray *v.* Brignardello, 1 Wall. 627; Gibson *v.* Chouteau, 45 Mo. 171).

OTHER POINTS.

Appellees claim the legal title through foreclosure of a six hundred dollar mortgage given to one of them by Sproule, according to the abstract of conveyances which they offered in evidence. This foreclosure seems to have taken place in the years 1883–'4. The record shows that soon after obtaining the patent to the land (and probably getting from appellees for his services the sum named in the mortgage), Sproule left the Territory of Washington. He did not return until about the year 1879. He remained but a short time. Having gotten into some difficulty, and having been arrested on the charge of setting a barn on fire, he escaped into British Columbia, where he was afterwards hung for murder (Rec. 91–2). Meanwhile, and until the year 1884, the legal title vested in him, while the possession was in appellant, and was coupled in appellant with continual claim of right to the possession. The peculiar circumstances of the case save appellant from all imputation of *laches*. His possession was undisturbed: adding to it his service in the army, it is within a few weeks of twenty years (Rec. 46, 47, 75); it is not contradicted by appellees. This continued possession under claim of ownership should entitle appellant to the land. During much of this time the holder of the legal title was a fugitive from justice. In the three years which had elapsed from the transfer of that title to the appellees until the commencement of this suit, one of the principal transferees thereof, Edward S. Smith, was out of the Ter-

ritory nearly all the time until his death in December, 1885 (Rec. 13, 87).

For a long time after his death there was no qualified legal representative of his estate (Rec. 13, 14). In about a year from the time when his executors qualified, appellant instituted this suit.

For the errors in the record, the appellant is entitled to a reversal of the decree and to the relief prayed for in his bill.

Respectfully submitted:

JOHN ARTHUR,
THOMAS CARROLL,
HEBER J. MAY,
Attorneys for Appellant.

156-494

In the Supreme Court

Of the United States.

OCTOBER TERM, 1894 *TERM No. 215.*

ANTHONY P. CARR,
Appellant,
vs.
W. H. FIFE AND HARRIET A. FIFE, HIS WIFE, ET AL.,
Appellees.

Appeal from the Circuit Court of the United States for the District of Washington.

BRIEF FOR APPELLEES.

GALUSHA PARSONS,
Of Counsel for Appellees.

E. R. RAY, Printer, Tacoma.

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BRIEF FOR APPELLEES.

GALUSHA PARSONS,
Of Counsel for Appellees.

BRIEF AND ARGUMENT FOR APPELLEES.

This action involves the title to one hundred and sixty acres of land lying in the city of Tacoma, Washington, and there known as "Smith & Fife's addition."

The questions involved are:

First: Whether the decisions of the land officers upon questions of fact in cases of contest, where both parties have appeared, are conclusive. Appellees maintain that it is well settled by the decisions of this court that they are.

Second: Whether one complaining of the decisions of the land officers and that an error either of law or fact has been committed by them must in his pleadings and evidence show what the proceedings before them were, and if evidence was given, what it was. Appellees maintain the affirmative.

Third: Whether upon the admission of Washington Territory as a state, this case, which was then pending in the territorial court, was properly transferred to the federal court. Appellees maintain the affirmative.

Fourth: Whether the action was barred either by the statute of limitations or by laches under the rule generally recognized by courts of equity, and especially by the decisions of this court.

STATEMENT OF THE CASE.

June 28, 1871, plaintiff entered the land under the homestead laws. June 6th, 1873, one Robert Sproul filed in the office of the receiver a notice of contest upon the ground of abandonment. Both parties appeared and gave evidence. The register and receiver found that plaintiff had not at any time resided upon the land; that he had made no improvements of any value upon it, and although he had made occasional visits to the land, that he had not in good faith complied with the homestead laws, and recommended that his entry be cancelled. Plaintiff appealed, and the commissioner found that the evidence showed an abandonment. He again appealed and the secretary affirmed the decision and found that plaintiff had not at any time resided upon the land, and although he had a cabin and other small improvements there, he had actually resided in the village of Tacoma, several miles distant, and directed that the entry be cancelled, which was done by the commissioner May 19, 1874, and the local officers notified accordingly. A patent was issued to Sproul December 13, 1875. All of the defendants claim under him.

This action was commenced June 13, 1887. The relief asked is in substance that defendants be adjudged to hold in trust for plaintiff's benefit as the equitable owner. Upon the admission of the territory as a state, the case was transferred under section 23 of the Enabling Act to the Circuit Court, where judgment was rendered in favor of defendants, from which this appeal is brought. The opinion upon the merits begins at page 31 of the printed record. The case is reported in 44 Fed. Rep. 713.

Upon the trial plaintiff tried and submitted his case without any regard to what had taken place before any of the land officers other than his entry and an extract of a few lines from the opinion of the register and receiver that he had made occasional visits to the land, from which it might be inferred that he had not wholly abandoned his *claim*. *Record 108*. That there had been a contest and that in some way his entry had been cancelled and Sproul had obtained a patent, was about all that appeared when plaintiff rested. The evidence upon the trial on the part of the plaintiff begins at page 41 of the printed record and extends to page 109.

Defendants called no witnesses, but offered in evidence:

First: A certified copy of the contest proceedings, including the evidence, the opinion of the register and receiver and their recommendation to the commissioner and the subsequent appeals, with the decisions of the commissioner and secretary and the direction by the latter to the commissioner that the entry be cancelled.

Second: An original deposition by plaintiff in an action brought by him against the Tacoma Land Company, as to which it was stipulated that if the evidence was held competent, a printed copy should be used in place of the original.

Record 109, Deposition 230.

Third: The patent to Sproul.

Fourth: An abstract of the title of these several defendants. *Id. 295*. Which it was stipulated should be received in place of the original instruments. *Id. 110*.

These various proceedings are contained in the printed record as follows:

1. June 28th, 1871. Plaintiff's entry, pages 107-108.

2. June 6th, 1873. Sproul's notice of contest. 182-183.

3. Testimony before register and receiver. 134-184.

4. August 10th, 1873. Opinion of register and receiver. 188.

5. September 5th, 1873. Plaintiff's notice of appeal, 192.

6. September 8th, 1873. Letter of register and receiver to commissioner transmitting evidence and proceedings before them. 112.

7. October 16th, 1873. Decision of commissioner affirming that of register and receiver. 204.

8. Appeal from commissioner to secretary. 193

9. May 5th, 1874. Decision of secretary directing plaintiff's entry to be cancelled. 204.

10. May 9th, 1874. Cancellation of entry and notice to register and receiver. 205.

11. December 13th, 1875. Patent to Sproul. 294.

I.

THE CASE UPON ITS MERITS: *The Jurisdiction of the Courts:*

As I understand the rule as established by the decisions of this court, and too well established to be brought into question, it is that where the parties have appeared or have had an opportunity to appear before the land officers, the jurisdiction exercised by the courts is for *review and correction*, and is limited to the correction of the errors of the land officers in the construction or application of the law to the facts *as they have found them;* that their conclusions of fact from the evidence given before them are final; that the courts will look into the proceedings before them no farther than is necessary in order to de-

termine, not whether they erred in their judgment upon the facts, but whether any error of law was committed by them, to the prejudice of the complainant, and whereby the land to which he was in law entitled was given to another. In other words, that the jurisdiction is essentially one of review and not generally of the subject matter.

It cannot but follow as a consequence of this rule that where one comes into a court of equity claiming that the land officers have erred in their construction of the law or in its application, to his prejudice, he must show both by his pleadings and his evidence what was done before them, how the question arose, and what the error was which he claims they committed. If the rule is substantially as here stated and the inference a correct one, it seems to me it follows that that is an end of this case, for the following reasons:

First: While the complaint shows that there was a contest before the register and receiver and that they received testimony in support of the claims of the parties, it does not show what the testimony was or what the decision was or whether the contest ended there. The only allegations as to what was done are contained in paragraph six of the complaint.

The allegation is not that these officers committed any error in their decision, but that they had notified plaintiff in writing, in effect that they had decided in his favor, and *therefore*, he gave the matter no farther attention until he accidentally heard sometime after that a patent had been issued to the contestant.

All of the other allegations as to his claiming credit for the time of his army service, or what offers he had made to prove up, or when they were made, have no relation to any-

thing that took place upon the contest. The same may be said as to the allegations of each of the following paragraphs of the complaint: the twelfth—*fraudulent conspiracy*; thirteenth —as to *how the patent was procured*; fourteenth—*that Sproul was an alien*, and fifteenth—*that before he filed his declaratory statement in this case he had entered other lands under the pre-emption and homestead laws*.

If these matters were true, I think it would be sufficient to say that none of them were brought to the attention of the land officers; but they are wholly without support even in the evidence taken upon the trial.

Second: It was only by defendants' answer that the real facts of the case—the contest, what was done and by what officers it was finally decided, and upon what grounds—were brought to the knowledge of the court. But for the allegation that the register and receiver notified plaintiff that they had decided in his favor, which all of the evidence shows to be directly contrary to the fact—plaintiff, as I understand the law, would have had no standing in court, his complaint would have been demurrable. His case was tried as it was left when he rested, precisely as if there was no such thing as a land department and land officers other than the register and receiver, and as though the land laws and the proceedings under them for the sale of public lands were subjects over which the courts would take original jurisdiction. The case made before the court upon the trial was not the case, the evidence was not the evidence upon which the land officers acted. The question, it seems to me, resolves itself into this: May one who has been heard before the land officers, who has given his evidence there and by appeal has been heard before the commissioner

and then before the secretary of the interior, and all of the way through without any charge of fraud by the officers or the other party, or any allegation that he was in any way prevented from fully presenting his case, come into the courts and there make a new case? How many times this court has decided directly to the contrary I do not know, but certainly a great many, so many that in Steel vs. Smelting Company, 106 U. S., it spoke of such efforts in this way:

"We have so often had occasion to speak of the land department, the object of its creation and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel in discussing the effect to be given to the action of that department, overlook our decisions on the subject."

If the average lawyer living anywhere in the Mississippi valley or farther west were asked what cases he has most frequent occasion to consult some or all of the following would probably be among those that would first come to his mind: Lindsay vs. Hawes, Johnson vs. Towsley, French vs. Fyan, Shepley vs. Cowan, Vance vs. Burbank, Moore vs. Robbins, United States vs. Marshall Mining Company, Steel vs. Smelting Company, and so on to Turner vs. Sawyer, in the 150th volume of the reports of this court, where the court, in speaking of this rule, said, as it had often said before: *We announce this to be the settled doctrine of this court.* There are certain exceptions to the rule as well recognized as the rule itself, such as that the proceedings were *ex parte* in the sense not only that the party complaining was not heard, but that he had no opportunity to be heard, or that fraud was practiced by the officers, or by the other side, which prevented a fair hearing upon the merits. But from the statement above it is manifest that there can be

no occasion for an examination of the authorities in that respect. As to what one bringing an action must show as to the proceedings before the land officers, and how it must be shown as a condition of *getting into the courts at all*, the cases are not so numerous, but I suppose the rule is not materially different from that which applies generally to other special tribunals, that the suit is essentially one for *review and correction*, not of *retrial*. From which I suppose it to follow that the party who invokes the aid of a court of equity must show by his pleadings what it is that he desires to have corrected, and as the jurisdiction extends only to the correction of errors of law, that he must affirmatively allege and prove what the error was which he claims the land officers committed, and that upon a proper construction of the law and a proper application of it to his case the decision would have been the other way.

I cannot find that this court has ever looked upon this as a question for either doubt or argument. Where it has been referred to, it has been in a way which seems to me to imply that from the very nature of the proceeding and the grounds upon which the courts will at all take jurisdiction, it must appear by plaintiff's own showing what the error was, that it was a mistaken construction of the law or an error in its application to his case and one which being corrected would entitle him to the relief demanded.

Among the cases which appear to me to warrant this conclusion are the following:

In *Lansdale vs. Daniels*, *100 U. S.*, *118*, speaking of the law as declared in Shepley vs. Cowan and Moore vs. Robbins, the court said:

"But if the law were otherwise, it would not benefit defendant as he does not show what questions were litigated before the land officers; nor does the record contain any specification as to what the rulings of the officers were in regard to any particular point. It appears that there was a contest between the parties there, and that the case was decided in favor of the plaintiff, but the grounds of the decision are not given. Such being the state of the pleadings, it is impossible to say that any error of law was committed by the tribunal."

In *Marquez vs. Frisbie, 101, U. S., 477-79*, speaking of the decision of the secretary of the interior then before it, after stating that it was alleged in the complaint that the register and receiver refused to receive the money of complainant and had returned the proofs with their opinion to the general land office, and that the secretary of the interior upon the opinion of the attorney general reversed the decision of the commissioner, it said:

"No copy of the opinion of the attorney general or of the secretary of the interior is given, nor is there any other statement than this of what principle of law was decided. * * * The bill contains no allegation whatever of the proofs of the defendants, or of what they did or did not prove in regard to possession, except that they had not resided on the land."

Farther on it said:

"It is urged in argument that the facts stated by plaintiff in regard to his own settlement, possession and declaratory statement show his right to receive a patent for the land, and that on demurrer these are to be taken as true. We are hardly inclined to believe that if anything so stated is to be treated as absolute verity, that it makes out his right; but it is sufficient to say that plaintiff also shows that all his proofs, together with those on the other side which he has not set out in his petition —in this case nothing is set out in the complaint—were submitted to and passed upon by the land officers, from the register and receiver up to the secretary of the interior, and they decided against the validity of his claim.

In *Bear vs. Luse, 6 Sawyer, 156*, the court, in laying down the rule as here stated, said:

"The decision of the land officers upon the questions of fact is not only conclusive of all questions actually made before them, but upon all questions within the scope of the inquiry and which might have been made if the party complaining had so chosen."

And in *Vance vs. Burbank*, *101 U. S.*, *520*, this court, in speaking of the question then before it, said:

"This was one of the matters that might have been presented to the land department, and therefore is concluded by the decision of that tribunal."

Appellant's Argument upon the Facts:

A large part of the argument of appellant's counsel is devoted to a discussion of the facts, partly as to what conclusions the land officers ought to have drawn from the evidence given before them, and partly and more largely upon what appeared at the trial, but which did not appear before the land officers. In both respects I think they are arguing directly in the face of the decisions of this court. As to the latter, it would not only be to substitute a court for the tribunal provided by the acts of congress for the hearing and decision of such matters, but in this case it would be to try the case anew upon evidence taken fifteen years after their decision and a large part of it relating to occurrences subsequent to it.

The portion of the argument most dwelt upon and oftenest repeated is that which relates to the real or supposed army services of the plaintiff, to which they say the register and receiver paid no attention, to which we can very well answer by saying: Why should they? They knew nothing about it unless they went back to the affidavit made by him at the time

of his entry to secure the benefit of the act of July 15th, 1870, in respect to double price lands, and then assumed without evidence that he had served the time required by the acts of congress and been discharged as there required, and found contrary to the evidence that he had resided upon the land as required by the acts of congress relating expressly and exclusively to soldiers.

Beyond that there was absolutely nothing before them showing that plaintiff had ever been in the army except the few words which follow:

Counsel: Are you a strong man? Can you do hard work —a great deal at a time?

A. I am able to do light work; am not able to do heavy work; am not strong; was wounded in the hip during the war and have not wholly got over it.

Q. Did you state you had been a soldier?

A. Yes, sir.

Q. And taking your homestead under the soldier's act?

A. Yes, sir. *Record, 157.*

The evidence before the register and receiver begins at page 132 and extends to page 182 of the printed record. This is the only allusion which your honors will find to plaintiff's army services which make up so large a part of the printed argument of his counsel now on file in this court. His certificates of discharge were produced for the first time upon the trial, and so far as the evidence shows, were never seen nor heard of by any of the land officers. If they had been, it would not, however, in my judgment, have helped his case. All of the officers found *facts* which have times innumerable been held

by the department officers sufficient to show an abandonment, whatever may have been the language in which they have expressed themselves. They find that he never resided upon the land, and while it is possible that by a very refined criticism it may be said one cannot abandon what he never had, that would be no answer, for what the act of congress requires is an actual residence upon the land—R. S. Sec. 2297—and that they found against the plaintiff. This is required as much of a soldier as of any other citizen.

As to soldiers, the language of the statute is:

But no patent shall issue to any homestead settler who has not resided upon, improved and cultivated his homestead for a period of at least one year after he shall have commenced his improvements. Id. Sec. 2305.

But with my understanding of the law as expressed above, where the parties have appeared and given their evidence, that the courts will accept the decisions of the land officers as conclusive upon all questions of fact, and will only look into the facts for the purpose of determining whether they have committed an error of law, I cannot feel that I ought to take your honors' time in an effort to answer this portion of the argument.

What questions were before the register and receiver, and that this was not before them, defendants' evidence shows, and their opinion shows that they found that there had been no compliance with the law as to residence upon the land. Record, 188. If any argument could be tolerated here as to what the fact was in that respect, and whether their finding was or was not against the weight of evi-

dence, or whether there was any evidence at all to the contrary, I would be entirely willing to submit it without any further argument than that of contestant's counsel before those officers. Record, 184. Decision of commissioner, 204. Of the secretary, same page. I do not understand that cases under the land laws turn upon the critical meaning of a word, whether it be the word "abandonment" or any other; but that the real question is, and ought to be, whether there has been an actual honest compliance with the law by the complainant's doing, or at least making an effort to do, what the statute says he must do to entitle him to a patent, and the failure to do which causes the land at the end of the prescribed period—six months—to revert to the government and of consequence leaves it open to entry by any other qualified claimant. That is precisely what I understand this court to have decided in Lee vs. Johnson, 116 U. S., 51. After which I suppose it very little matters what the department may, prior to that decision, have said about how parties should bring their controversies before them, or how issues should be framed, or what they thought the extent of their jurisdiction under the forms in which such cases were commonly presented before them.

As to what is said in the argument about claim jumpers, fugitives from justice—that contestant was a dangerous man—an unnaturalized alien—covetuous land speculators—that he was the tool of fraudulant and wicked conspirators—was all said after he and the so-called chief of the wicked conspirators had been for some years in their graves. Your honors will find no mention of these matters before the land officers.

As to the legality of the tribunal and that the register and receiver forwarded their joint opinion to the commis-

sioner, I am content to rest upon the same authority from which counsel have quoted so much at large, namely, that of the practice of the department and their uniform instructions to the local land officers to forward their *joint* opinion in all cases where evidence is taken before them. But they did not cancel appellant's entry; nor, of course, had they any power to do so; that was done by the commissioner upon the order of the secretary. Record, 204.

There are a number of other matters mentioned in the brief to which, as I find no mention of them in the record, I do not feel called upon to make answer here.

II.

If in all that I have argued up to this point I shall be found to be in error, and if, contrary to what is there maintained, it shall be held that plaintiff's entry was erroneously cancelled:

This action was barred, first, by the statutes of limitations of the Territory of Washington—Code 1881, Sec. 26, Pleaded, Record page 10, par. 15. Second, by the general equitable rule in respect to laches.

The contest was in 1873, the contestant obtained a patent December 13, 1875. This action was commenced June 13, 1887. The claim made has been that the statute did not run because plaintiff was in possession. Of course, to prevent the running of the statute there must be an actual visible possession. It can hardly be said that plaintiff or his counsel claim that. The claim has been that he had not *abandoned* not the *land* but his *claim*; in other words—although the evidence does not show that he ever before asserted any such right, or made

known to these defendants, or any of them, that he was still making claim to a *right* to the land—that he or they claim that the cancellation of his entry was void, and therefore, whether he lived upon the land or not, he was by operation of law entitled to the possession of it. I think I state the claim of the appellant and his connsel as favorably at least as anything in the record will warrant, and upon this statement I am willing to submit the question.

As to plaintiff's laches, if there were anything to take the case out of the strict bar of the statute, everything is against him, and this court has recognized the rule too often to leave any question as to what it is. Both the contestant and the first purchaser from him were dead; the property had increased more than a hundred fold in value, many sales had been made in reliance upon the patent title; it had been platted—Record, 299, No. 19—as a part of the city of Tacoma, with the natural consequence of taxation for all purposes, from state to municipal. During all of which time, if the claims now made in his behalf are to be credited, plaintiff was *looking on* with the secret intention sometime—though that is not exactly the way in which his counsel put it—of making trouble by the claim which he now makes. The evidence does not very clearly show where he was during all of this time. He says he was in possession of the land; but it has not been claimed, and I suppose will not be, that by that he meant anything more than to claim that he thought or had been by somebody advised that the law would attach the idea of possession to his certificate of entry, although it had been in fact cancelled, the cancellation being claimed by him and his counsel to have been made without his knowledge and without jurisdiction by the

officers to make it; about all of which I do not care to say more than I have already said.

I am content to leave his claim that the officers notified him that their decision was in his favor in connection with the fact that the notice claimed was not produced or accounted for, and that two days after the decision he wrote to the commissioner the letter which your honors will find printed in the Record at page 132.

That he knew nothing about either of the appeals; that he only accidently heard that the patent had been issued to Sproul, to speak in the mildest possible manner, is simply incredible. The fact is he was not upon the land—he lived several miles away—but manifestly knew enough about what was going on to have called upon him if he had any claim to make it known. For nearly twelve years after the patent was issued, and for fourteen years after the contest was decided against him, he said nothing. All of which, whether it be called estoppel or laches, or whether—about which I do not see that there can be any question—the action is or is not barred by the statute of limitations, it is too late for a court of equity even *to consider* the question, upon such evidence as is now here, whether taken before the land officers or upon the trial of the case, and if there were no rule excluding from the consideration of the courts in the fullest manner all the questions of fact passed upon by the land officers, *whether the title of the present owners should be decreed to be held in trust for this plaintiff.*

Badger vs. Badger, 2 Wall., 87.

U. S. vs. Marshall Silver Mining Co., 129 U. S., 579.

Halstead vs. Grinnan, 152 Id., 412.

III.

Jurisdiction of the Circuit Court.

As already stated, the action was commenced in the territorial district court, where it was pending at the time of the admission of the territory into the Union. Upon its admission the then counsel stipulated that the case should be re-submitted in the territorial court, which was never done. After several months, no action being taken in the territorial court, counsel for defendants filed a request that the case be transferred to the circuit court, as provided by section 23 of the act providing for the admission of the territory as a state into the Union. 25 Statutes at Large, page 683. An order transferring the case was accordingly made. The record does not show whether there was or was not any objection made to the transfer, or any request that it be submitted to the territorial court, or any claim made that it had been so submitted. The time in which it should have been decided under the state constitution —ninety days—had expired, and of consequence even if there had been a submission, it would have lapsed.

What defendants wanted was to get the case heard and decided, and as it was one which could ultimately be brought into this court, they cared very little as to where it should be first heard. When the case came on for hearing in the circuit court plaintiff's counsel filed a motion to remand—Record, 23—but did not specify as one of the grounds that the case had been improperly transferred, and I think it plain from the motion that no such thought had then occurred to the counsel making it. After the decision plaintiff's counsel moved to vacate the decree and to remand the cause because it did not appear that the property was of the

value of two thousand dollars—Record, 30. Upon motion the court allowed affidavits to be then filed *nunc pro tunc*, which had been allowed at the time of the original motion. but through inadvertence had not been done. These affidavits show the property to be worth a half million of dollars or more, and that it was so stated by the court when the first motion was made. Id., 27. The motion to remand was denied. Opinion upon the second motion, page 25; the first is contained in the opinion upon the merits, page 31. It was my opinion then and is now that these affidavits were unnecessary; but if necessary, that the court could allow them to be filed—as it did—*nunc pro tunc.* I then understood the rule, and do now, that in cases where the subject matter is other than a money demand, it is sufficient if the value of the property appears by the evidence to the equal to the jurisdictional amount. The evidence shows that years before plaintiff asked thirty thousand dollars for it, and that the parties seeking to buy it of him thought it worth ten thousand —Record p. 60—and the petition for an appeal—page 37—says it exceeds ten thousand dollars. Of course, that was not designed as an estimate of its real value. The affidavits show approximately, certainly none too high, what its real value was. This court held in *ex parte* Bradstreet, 7 Peters, 647, that in cases of this kind it is sufficient that the evidence shows the value of the property.

As to the first ground claimed for remanding, the parties had taken no action under the stipulation; if the case might have been submitted to the court, it had not been. The first thing done and the first time the attention of the court was in any way called to it was by the application for the order transferring it. The argument of appellant's counsel, it seems to

me, would amount to this: That a party by appearing before the court and asking that the case be transferred *thereby* submits himself to the jurisdiction of the court, and *therefore* it cannot be transferred.

It is submitted, too, that the grounds stated in the opinion of the judge that neither party had taken any active steps in the case and that the court had assumed no jurisdiction over it, would of itself be a sufficient reason for denying the motion to remand.

As to the second motion, all that I care to say is contained in the above statement. The value of the property not only appeared by the evidence as the case came into the circuit court, but was admitted, as your honors will find stated in the opinion of the judge, before the hearing which proceeded upon the understanding that affidavits might be filed to show its value.

In respect to what is said to the effect that the district judge should have declined to sit in the cause, I almost feel that I ought to apologize for saying anything at all. No pretence is or was made that he had ever been of counsel in this case or that he had ever been consulted in respect to it, or as to anything connected with it. This, too, is mentioned in the opinion, and I am content to leave the question upon the statements there made.

GALUSHA PARSONS,

Of Counsel for Appellees.

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